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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CIRCUIT JUDGES DIXIE
HERLONG CHASTAIN, etc., et al.,

Petitioners,

-vs-

HILARY DAVIS, individually
and on behalf of all others
similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER FEDERAL HABEAS CORPUS LIES AS A REMEDY TO CHALLENGE THE ACTION OF A STATE IN DEPENDENCY PROCEEDINGS TO REMOVE CHILDREN FROM THE CUSTODY OF PARENTS.

II. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES A STATE TO FURNISH AN INDIGENT PARENT COURT-APPOINTED COUNSEL IN ALL STATE DEPENDENCY PROCEEDINGS TO TEMPORARILY REMOVE CHILDREN FROM THE CUSTODY OF PARENTS.

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No. _____

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CIRCUIT JUDGES DIXIE
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

The Petitioners respectfully request that a writ of certiorari issue to review the en banc judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 23, 1981.

OPINIONS BELOW

The following opinions of the lower court are included in the Appendix

to the Petition:

1. Opinion of the United States District Court for the Southern District of Florida, rendered November 23, 1977, in this action.

2. Opinion of the United States Court of Appeals for the Fifth Circuit rendered June 6, 1980, in this action.

3. En banc Opinion on rehearing of the United States Court of Appeals for the Fifth Circuit rendered March 23, 1981.

JURISDICTION

The en banc opinion on rehearing of the Fifth Circuit Court of Appeal was entered on March 23, 1981. The issuance of the Mandate has been stayed until May 10, 1981. Jurisdiction to review this judgment of the Court of Appeals is conferred on the Court by 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

> Section 1 . . . [N]or shall any person of life, liberty, or property without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

28 U.S.C., Section 2254:

[set out in full in the Appendix hereto]

Sections 39.40, Florida Statutes, through 39.414, Florida Statutes (1979):

[set our in full in the Appendix hereto]

Sections 39.402, 39.407 and 39.41, Florida Statutes (as amended 1980):

[set out in full in the Appendix hereto]

STATEMENT OF THE CASE

This case has its origin in a class action in the Circuit Court of Dade County, Florida, challenging the constitutionality of any child dependency proceedings involving indigent parents when the parents are not provided with, or knowingly waive, counsel provided at the state's expense. The jurisdiction of the court was founded in 28 U.S.C., Section 2241, et seq. and 28 U.S.C., Section 1343(3) and (4). The complaint in one count, sought a Writ of Habeas

Corpus against judges of the Dade County Circuit Court to secure the release of a child from continuing custody or supervision by the Florida Department of Health and Rehabilitative Services[1/] and, in another count, sought declaratory and injunctive relief declaring the conducting of child dependency proceedings in Florida against indigent parents without providing them the opportunity for counsel at the state's expense to be unconstitutional.

Respondent HILARY DAVIS was the indigent mother of a 14-month-old son who was beaten by the child's father, resulting in the child receiving a fractured arm.

A petition of dependency, pursuant to Chapter 39, Florida Statutes, was brought with regard to the son on February 4, 1976. On March 4, 1976 a dependency adjudication hearing was held in the Dade

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1/William J. Page, then secretary of the Florida Department of Health and Rehabilitative Services and Florida Department of Health and Rehabilitative Services officials Max Rothman, Charles Hall and Jenet Vetter were defendants in the District Court proceeding, but have not been parties in the appellate courts.

County Circuit Court.

After hearing, the child was adjudicated to be a dependent child, to be placed in the temporary custody of the Division of Social and Economic Services of the Department of Health and Rehabilitative Services of the State of Florida, and Respondent Davis, who was not represented by counsel, was instructed to contact an attorney. Subsequently, on May 11, 1976, Respondent Davis, through counsel, filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida, seeking the return of the custody of her son. The Florida Supreme Court denied the Petition. Davis did not seek the direct appellate review of the United States Supreme Court.

The United States District Court for the Southern District of Florida granted summary judgment in favor of Respondent, Davis v. Page, 442 F.Supp. 258 (SD Fla. 1977), and the Petitioner Judges appealed. A panel of the Fifth Circuit Court of Appeals found, in pertinent part, in favor of Respondent that the due process clause of the Fourteenth Amendment requires that

parents in any Florida child dependency proceeding, whether for temporary or permanent custody, be advised of their right to assistance of counsel immediately following service of the petition for adjudication of dependency or seizure of the child and, if indigent, that counsel be appointed unless the parents knowingly and intelligently waive the court-established right to counsel. Davis v. Page, 618 F.2d 374 (5th Cir. 1980).

The Petitioner Judges sought rehearing en banc, which was granted. The en banc decision of the Court of Appeals, in a decision in which 13 judges joined, 11 judged dissented and two abstained (on the basis of preferring to defer decision pending this Court's pending decision in Lassiter v. Department of Social Services of Durham County, North Carolina, Case No. 79-6423) affirmed the prior opinion in pertinent part, except to vacate the injunctive relief against the state court judges. Specifically the Court held that the respondent parent was entitled to invoke federal habeas corpus jurisdiction to recover custody of her child, relying on the unreported opinion in Lehman v. Lycoming

County Children's Services Agency (3rd Cir., July 23, 1980), which opinion has subsequently been reversed on en banc rehearing by the Third Circuit, on March 31, 1981 (See 49 LW 2642, April 14, 1981).

The en banc court further held that this was not a proper situation for invoking the doctrine of abstention and reaffirmed that in all dependency proceedings pursuant to Chapter 39, Florida Statutes, due process requires that indigent parents be offered counsel and that counsel be supplied unless a knowing and intelligent waiver is made. In the dissent of 11 judges, the appropriateness of federal habeas relief was strongly disputed, as was the rejection by the majority opinion of the "case by case" approach to providing counsel, which had been enunciated by the Florida Supreme Court in Potvin v. Keller, 313 So.2d 702 (Fla. 1975), which relies upon Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1975), the only federal Circuit Court of Appeals case on point.

From the majority opinion, this appeal is taken.

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

A. THE EN BANC DECISION OF THE DECISION OF THE FIFTH CIRCUIT COURT

OF APPEALS, WHICH DETERMINES THAT FEDERAL HABEAS CORPUS LIES AS A REMEDY FOR A PARENT TO CHALLENGE THE ACTION OF THE STATE IN CIVIL DEPENDENCY PROCEEDINGS TO REMOVE CHILDREN FROM THE CUSTODY OF THE PARENT, GREATLY EXPANDS THE BASIS FOR ASSERTION OF THE WRIT OF HABEAS CORPUS, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE FIRST AND THIRD CIRCUIT COURTS OF APPEAL, AND IS UNSUPPORTED BY THE DECISIONS OF ANY OTHER CIRCUIT COURT.

The en banc majority opinion of the Fifth Circuit in this case finds specifically that Respondent Davis was entitled to invoke federal habeas corpus jurisdiction, even though the child was in her custody prior to the District Court rendering judgment. The Court, with virtually no discussion asserted:

> . . . We decline the state's invitation to declare habeas relief inappropriate whenever the custody of a child is at stake. While domestic relations are normally within the province of state courts, nothing in the history of the habeas writ suggests that it should be denied merely

because the custody at issue results from a adjudication involving child custody. See Lehman v. Lycoming County Children's Services Agency (3d Cir. July 23, 1980). But see Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978).

This extension of the Writ of Habeas Corpus to child custody cases is novel, unsound and contrary to the law of the other circuits. Indeed, the very opinion upon which the en banc opinion relies, Lehman v. Lycoming County Children's Services Agency (No. 79-2466, 3d Cir., July 27, 1980), has been reversed on en banc rehearing. (See Lehman v. Lycoming County Children's Services Agency, 49 LW 2642 (3d Cir., March 31, 1981), in a decision in which the en banc majority accurately noted that habeas corpus differs from other constitutional challenges in that it is not subject to the doctrine of res judicata. That doctrine precludes a litigant who has fully pressed a claim in one court from obtaining a second adjudication of that claim. Habeas corpus, because it embodies considerations of personal liberty, is the major exception to the res judicata doctrine. The writ of

habeas corpus represents society's judgment that avoiding wrongful incarceration and unlawful restrictions on liberty outweighs the otherwise compelling interest in finality of litigation.

While the ability to avoid res judicata is an extraordinary characteristic of habeas when the relitigation takes place within the same judicial system, the writ assumes even more profound implications when its operations cut across the federal and state judicial systems. The awesome power of the writ to avoid res judicata, and its implications for federalism, demand that its use be confined to its proper role; the preservation of individual liberty and the relief from unlawful custody.

This is highlighted by the comments of Judge Brown in his dissent in this case:

> Once again this Court in the high name of the Constitution becomes involved by the majority in the most direct way in domestic problems wisely left to the states. Not only that, it is done by an order declaring unconstitutional prior decisions of the state's highest tribunal through the medium of an attack directed against innocent local state trial circuit judges, all of whom--including all other judges high and low in the whole state of Florida--are not categorically

> directed, without discretion or consideration of real needs, to conform to our edict. I think all of the principles of Federalism and the demands of comity are defeated by this action and I therefore dissent from this instrusion.
>
> Davis v. Page, 618 F.2d 374, 386 (5th Cir. 1980) (dissenting opinion)

Habeas lies to challenge unlawful custody, but unlawful custody is simply not the issue in a parental rights termination case. It is not the liberty interest of the children that is sought to be protected in such a case, but only the right of the particular parent to raise them. Such an interest is unrelated to the core concern of the writ of habeas corpus.

Since the enactment of the habeas corpus statute in 1967, the Supreme Court has never asserted habeas corpus as an appropriate remedy for litigating federal constitutional rights arising from state child custody disputes. Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1110 (1st Cir. 1978):

> . . . [T]he fact remains that over the many years since enactment of the habeas corpus statute in 1867, the Supreme Court has

> never acknowledges that habeas corpus is an appropriate remedy for litigating federal constitutional claims arising from state child custody disputes. In two child custody cases decided on federal question grounds (but arguably having jurisdictional connotations) the Court refused to authorize the writ. Matters v. Ryan, 249 U.S. 375, 39 S.Ct. 315, 63 L.ED. 654 (1919); in re Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890). None of the cases implicating custody rights that have come before the Court reached the Court through the route of federal habeas. The Supreme Court's sweeping language in caces such as Hensely v. Municipal Court, supra, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 141 (1973) and Jones v. Cunningham, supra, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), concerned extensions of the writ of persons criminally accused who had obvious claim to be treated for federal jurisdictional purposes in the same manner as their incarcerated brethren, even if not confined in the strict sense.
>
> 584 F.2d 1103, 1110.

Further, Circuit Judge Brown, in his en banc dissenting opinion in this case notes astutely the problems which both the Sylvander and Lehman courts have indicated:

> From a strictly legal standpoint, I disagree seriously as to the appropriateness of Federal habeas relief in this case. The "custody" of Carl Davis which purportedly gave rise to Federal habeas in this case was not the type of "custody" which has traditionally formed the basis for habeas relief. Even a cursory review of the Court's opinion reveals that the primary interest being addressed is the interest of Ms. Davis as the parent in not being deprived of her child. . . .
>
> From the standpoint of the administration of justice and the maintenance of our cherished principles of federalism, I am acutely disturbed by the recognition of Federal habeas as an available avenue of relief in child custody disputes. First, I am not convinced that the interests of family and child will be significantly fostered by permitting actions such as these to be litigated in two sets of courts--first state, and then federal, or worse, perhaps simultaneously. Furthermore, I suspect that it will be difficult for our courts to place limits on the types of child custody cases which may be brought in Federal Courts through the habeas route. . . .

These analyses clearly indicate the significance of the use of habeas corpus as an avenue for review in child custody proceedings, and clearly presents an issue of substantial importance, especially when

considering the possible implications of extension of the doctrine into the area of custody conflict generally. The Fifth Circuit has sharply broken from the other circuits speaking on the matter, relying on the Lehman decision which has since been reversed, and this situation presents a clear basis and need for certiorari pursuant to Rule 17 of the Rules of the United States Supreme Court.

B. THE EN BANC DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS EXTENDING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO REQUIRE A STATE TO FURNISH AN INDIGENT PARENT COURT-APPOINTED COUNSEL IN ALL STATE DEPENDENCY PROCEEDINGS TO TEMPORARILY REMOVE CHILDREN FROM THE CUSTODY OF THE PARENT GREATLY AND IMPROVIDENTLY EXPANDS THE RIGHT OF COUNSEL DOCTRINE ORIGINATING IN GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S.Ct. 722, 9 L.Ed.2d 799 (1963), AND CONFLICTS DIRECTLY WITH THE OPINION OF ANOTHER CIRCUIT COURT OF APPEALS.

The en banc Circuit Court in this case has held that in dependency proceedings to which the State is a party and in which the custody of a child of an indigent parent is involved, the court hearing the matter must, as a constitutional mandate, provide assisgned counsel to the parent when desired and must inform the parent of the opportunity to have counsel so appointed. The Court specifically rejects the case-by-case approach to providing of counsel in temporary custody proceedings, as enunciated by the Florida Supreme Court in Potvin v. Keller, 313 So.2d 703 (Fla. 1975), which directly adopted the rule from Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974). Further, they do so in spite of the fact that the Florida Supreme Court has required the appointment of counsel in all cases where indigent parents are threatened with permanent loss of custody or when criminal charges may arise from the proceeding.[1/] It

1/Thus, this opinion is more extreme than that which is before this court in Lassiter v. Dept. of Social Services (U.S. Supreme Court, Case No. 79-6423) where the issue is the right of indigent parents to counsel in actions to terminate parental rights.

is only in cases which contemplate less serious consequences than the case-by-case approach comes into play. In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980).

One of the keystones of our criminal justice system is the right, found in the Sixth Amendment, that all individuals will have the assistance of counsel in criminal prosecutions regardless of their ability to pay for legal services. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

However, despite the Sixth Amendment's literal entitlement to counsel in "all criminal prosecutions," the Supreme Court has qualified that guarantee. In Scott v. Illinois, 440 U.S. 367, 59 L.Ed.2d 383, 99 S.Ct. 1158 (1979), the Court declined to extend the right of appointed counsel to defendants prosecuted for petty offenses but not actually sentenced to jail. Excursions from the literal language of the Sixth Amendment are discussed by Mr. Justice Rehnquist, in Scott, supra, as follows:

> The number of separate opinions in Gideon, supra, Duncan, supra,

> Baldwin, supra, and Argersinger, supra, suggests that constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another. . . . The range of human conduct regulated by state criminal laws if broader than that of the federal criminal laws, particularly on the "petty" offense part of the spectrum. As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended lin when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so. . . .

Scott, supra, at 440 U.S. 372

If the precise limits of the Sixth Amendment are indeed as ill-defined as Mr. Justice Rehnquist suggest, the cases already discussing right to counsel, such as Gideon v. Wainwright, must be applied to novel situations with caution.

The potential for incarceration is precisely what led the Supreme Court to extend the right to counsel to a quasi-criminal proceeding. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). In its only extension of Sixth Amendment

principles to proceedings outside adult criminal prosecutions, the Court repeatedly stressed the criminal nature of juvenile delinquency proceedings.

The United States Supreme Court has not included the right to counsel in due process protections under the Fourteenth Amendment since Gault was decided in 1967, although the Court has certainly had the opportunity to do so. See Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1973); Wolff v. McDonnell, 418 U.S. 534, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Baxter v. Palmigiano, 425 U.S. 300, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Cf. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 636 (1973).

In other types of actions (herein denominated "civil" because the interests affected are other than the individual's personal freedom,) the procedures afforded require something else. The Court in Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), considering the interest of the State of New York in employing judicial proceedings to settle trust accounts, laid down a principle of procedural due process that stands immutable today:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> Id. at 313 (e.s.)

The Court in Armstrong v. Manzo, 380 U.S. 545 (1965), set forth the principle that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." See also Goldberg v. Kelly, 397 U.S. 254 (1970).

The only circuit other than the Fifth to address the issue of right to counsel in civil custody matters has been the Ninth Circuit in Cleaver v. Wilcox, supra. In Cleaver, relied upon by the Florida Supreme Court in Potvin, supra, and In the Interest of D.B. and D.S., supra, the Ninth Circuit Court chose not to impose upon the state court system an inflexible constitutional requirement that indigent parents receive court appointed counsel in every dependency proceeding. Instead, the court held that parents are entitled to a judicial decision on the right to counsel in each case.

> The determination should be made with the understanding that due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child.
>
> Cleaver, supra, at 945 [footnote omitted]

The court indicated that the right to counsel in juvenile dependency proceedings would be determined by the relevant circumstances in each case and that criteria for offering counsel to indigent parents would include (1) the potential length of parent-child separation, (2) the degree of restrictions on visitation, (3) the presence or absence of disputed facts, (4) the presence or absence of parental consent, and (5) the complexity of the proceeding in terms of witnesses and documents. This position has been adopted and followed by the Florida courts.[1/]

1/As noted by Judge Brown in his dissent in the initial Fifth Circuit decision, it may be that the state trial judge erred in not appointing counsel in this case. Such, however, is not sufficient basis for removing all discretion from the state courts to address the matter on a case-by-case basis.

The Fifth Circuit has thus taken a position novel to the federal appellate courts and in direct conflict with Cleaver v. Wilcox, supra, has extended the right to counsel originating in the Sixth Amendment, to civil custody proceedings, thus clearly raising an extremely important question which should be addressed by the United States Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Hilary DAVIS, Individually and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

William J. PAGE, Jr., etc., et al., Defendants,

Circuit Judges Dixie Herlong Chastain, etc., et al., Defendants-Appellants.

No. 78-2063.

United States Court of Appeals, Fifth Circuit.

June 6, 1980.

Indigent parent brought class action seeking declaratory relief declaring unconstitutional the conducting of child dependency proceedings in Florida against indigent parents without providing them counsel at state's expense and seeking to enjoin dependency hearings without providing counsel to indigent parents. In a separate count, indigent parent sought writ of habeas corpus to secure the

release of her child from continuing supervision by Florida Department of Health and Rehabilitative Services. The United States District Court for the Southern District of Florida, 442 F.Supp. 258, Sidney M. Aronovitz, J., rendered summary judgment in favor of plaintiff, and defendants appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) due process clause of Fourteenth Amendment requires that parents in Florida child dependency proceeding be advised of their right to assistance of counsel immediately following service of petition for an adjudication of dependency or seizure of the child and if indigent, that counsel be appointed unless they knowingly and intelligently waive their right to counsel, and (2) case would be remanded

for a determination as to whether attorney fees could be awarded against state court judge under applicable civil rights statute.

Affirmed in part; remanded in part.

John R. Brown, Circuit Judge, filed separate opinion in which he concurred in part and dissented in part.

1. Federal Courts K.655

Ruling on a motion for an extension of time within which to appeal left largely in discretion of district court and Court of Appeals should not second-guess such determination. F.R.A.P. Rule 4(a), 28 U.S.C.A.

2. Federal Courts K.655

In light of fact that counsel for defendant did not discuss a possible appeal with his clients until filing date had passed, district court did not abuse

its discretion in extending defendants' time within which to file an appeal from decision declaring unconstitutional the conducting of child dependency proceedings in Florida against indigent parents without providing them counsel at state's expense. F.R.A.P. Rule 4(a), 28 U.S.C.A.; West's F.S.A. § 39.01 et seq.

3. Constitutional Law K.252.5

To determine whether due process requirements apply to a particular type of proceeding, court looks not to the weight but to the nature of the interest at stake. U.S.C.A. Const. Amends. 5, 14.

4. Constitutional Law K.274(5)

Indigent parent's right to family privacy or integrity of the family unit was a liberty interest entitled to constitutional protection in Florida dependency proceeding. U.S.C.A. Const. Amend.

14; West's F.S.A. § 39.01 et seq.

5. Constitutional Law K.255(4)

Due process clause of Fourteenth Amendment requires that parents in Florida child dependency proceeding be advised of their right to assistance of petition for an adjudication of dependency or seizure of the child and, if indigent, that counsel be appointed unless they knowingly and intelligently waive their right to counsel. U.S.C.A. Const. Amend. 14; West's F.S.A. § 39.01 et seq.

6. Criminal Law K.641.6(3)

Indigent criminal defendant threatened with imprisonment is entitled to appointed counsel in both federal and state prosecutions.

7. Federal Courts K.939

Case in which indigent parent suc-

ceeded in obtaining declaratory relief declaring unconstitutional the conducting of child dependency proceedings in Florida against indigent parents without providing them with counsel at state's expense would be remanded for a determination as to whether attorney fees would be awarded against a state court judge under applicable civil rights statute. 42 U.S.C.A. § 1988.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, BROWN and TATE, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from a Florida district court's ruling that the Federal Constitution requires that indigent

parents in child dependency proceedings be provided with counsel in all cases unless they waive that right, beginning immediately following service of a petition on the parent or seizure of the child. The trial court also ruled that the plaintiffs were entitled to a reasonable attorney's fee, pursuant to the Civil Rights Attorney's Fees Awards Act, P.L. No. 94-559, 42 U.S.C. § 1988 as amended. We affirm the holding of the trial court except as to the award of attorney's fees.

On January 30, 1976, Hilary Davis, the mother of Carl Thor Davis left her husband after he hit their 14-month-old child and broke the child's arm. After she turned to the state for assistance, the State initiated a dependency proceeding under Fla.Stat.Ann. § 39.01 et seq.

(West 1974) seeking to obtain custody of the child. At the initial hearing on February 4, 1976, in the Juvenile and Family Division of the Dade County Circuit Court, custody of the child was granted to the Florida Department of Health and Rehabilitative Services, pending a formal hearing on March 4. Hilary Davis was indigent and was unable to obtain counsel for this preliminary adjudicatory hearing. The judge did not offer to appoint counsel for her at this hearing, but he did advise her to have counsel present at the formal hearing.

The plaintiff, because of her poverty, was unable to hire counsel for the March 4 hearing. She tried to secure an attorney through a legal services office, but was unsuccessful. Thus she appeared at the formal hearing without counsel. The

circuit judge never asked her at the hearing about the failure to obtain counsel.

Under Florida law, pursuant to Fla. Stat.Ann. § 39.05(4) and 39.09(1)(b), while the state is represented by counsel at such a proceeding, the judge is not required to appoint counsel to represent indigent parents.[1]

According to the district court opinion, "without benefit of counsel, Hilary Davis was little more than a spectator in the adjudicatory proceeding. She was ignorant of the law of evidence,

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[1] Fla.Stat.Ann. § 39.09(1)(a) (West 1974) authorizes a continuance upon request of a parent who wishes to obtain counsel.

At the hearing, the rules of evidence generally applicable to all civil proceedings apply. The state must prove its case by the standard of a preponderance of the evidence.

and of the substantive law governing dependency proceedings. She sat silently through most of the hearing, and fearful of antagonizing the social workers, reluctantly consented to what she believed would be the placement of her child with the state for a few weeks." Davis v. Page, 442 F.Supp. 258, 260-61 (S.D.Fla. 1977). Ms. Davis evidently thought the state would take custody of the child for a few weeks while she found a new place to live and a job. She was unaware that a finding committing the child to the temporary custody of the state pursuant to Fla.Stat.Ann. § 39.10(4) and 39.11(1)(c) left the child in the state's custody "until terminated by the court or until the child reaches 18." See Davis v. Page, 442 F.Supp. 258, 261 (S.D.Fla. 1977). At the conclusion of the hearing

the court told Ms. Davis to contact a lawyer. She was not informed, however, of her right to appeal under Fla.Stat.Ann. § 39.14(1).

After the hearing, the child was adjudicated dependent and custody was given to the Department of Health and Rehabilitative Services (D.H.R.S.). Ms. Davis subsequently obtained counsel and filed a petition for writ of habeas corpus in the Florida Supreme Court seeking return of her son. That petition was denied. She subsequently filed suit in federal court on two counts. First, she sued officials of the D.H.R.S. in order to regain custody of her son. Second, she filed a class action on behalf of all indigent parents who were defendants in child dependency and neglect proceedings seeking a declaratory judgment that counsel must be

afforded to them at state expense in these proceedings. Named as defendants in the second count were the judges of the Juvenile and Family Division of the Circuit Court of Dade County, Florida, acting in their official capacity. The plaintiff also sought to enjoin dependency hearings in which counsel was not provided to indigent parents.

During the course of the proceedings in the United States court, custody was restored to Ms. Davis, subject to supervision by the state and the continuing jurisdiction of the state Circuit Court. By the time the child was returned to her, she had been deprived of custody for a full year.

On the second charge, the United States court found first that the "right of family integrity" given constitutional

protection under the Fourteenth Amendment, see May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), required strict scrutiny of the procedural safeguards required in these proceedings. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Applying strict scrutiny, the court reasoned that the right to counsel was an essential element of the procedural due process required in these proceedings. The court then concluded that while a dependency proceeding was not a criminal proceeding, it was substantially similar and that therefore, as in criminal cases, counsel had to be provided to indigent parents. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

Finally, the court ruled that counsel should be provided to indigent parents in all dependency proceedings, rather than assigned on a case-by-case basis. The court said such a right could not be waived prior to notice and that such a waiver to be effective had to be "knowing and intelligent." See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The court also said that counsel had to be made available "immediately following service of the petition or seizure of the child.[2]" 442 F.Supp. at 265.

An amended final judgment was entered in this case on January 25, 1978.

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[2] Under Fla.Stat.Ann. § 39.05, a dependency proceeding commences with the filing of a petition. Fla.Stat.Ann. § 39.06 allows the ex parte seizure of the child in exceptional situations.

Department of Health and Rehabilitative Services' officials acquiesced in the judgment and are not parties to this appeal.

Counsel for the Circuit Judges, without discussing the matter with his clients, determined on the basis of his research, not to appeal the judgment. On March 3, the plaintiff moved for civil contempt to enforce compliance with the final judgment. However, after finally discussing the matter with his clients, defense counsel for the judges decided to appeal. On March 22, the judicial defendants filed both a notice of appeal and a motion to extend the time within which to appeal under Federal Rules of Appellate Procedure 4(a). The district court granted the extension on the ground that the defense counsel's failure to

appeal constituted excusable neglect.

I.

The appellee argues first in a motion to this Court that the district court's granting of an extension to appeal beyond the usual 30 days constituted an abuse of discretion. Under the Federal Rule 4(a) applicable at the time:

> . . . Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. . . .

The appellee urges that the failure to appeal in this case was not "excusable neglect," since the defendants' counsel, the Attorney General's office of Florida, reached this decision after thoughtful research and deliberation based on legal research.

[1] We think the trial court decided this issue correctly. This standard of "excusable neglect," incorporated into the rule in 1966, was intended to broaden the former rule that defined excusable neglect only as "the failure of a party to learn of the entry of judgment.[3]"

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[3] See Stern, Changes in the Federal Appellate Rules, 41 F.R.D. 297, 298 (1968). See also the revised Federal Rule of Civil Procedure 73 (a) which became Rule 4(a):

> How and When Taken. An appeal permitted by law from a district court in a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed from, except that: (1) in any action in which the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days from such entry; (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed; (3) if a timely notice of

appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise herein prescribed, whichever period last expires; (4) an appeal by permission of a court of appeals obtained under Title 28, U.S.C. § 1292(b) shall be taken in accordance with the rule of the court of appeals. The running of the time for appeal in terminated as to all parties by a timely motion made by any party pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in the subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules; granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment, or denying a motion for a new trial under Rule 59.

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect

The "change was made because experience has revealed that there are a number of other situations in which tardiness is excusable and in which it is unfair to dismiss an appeal because of late filing of the notice." Stern, Changes in the Federal Appellate Rules, 41 F.R.D. 297, 298 (1967). Although the "excusable neglect" standard is still a strict one, this Court has held that a "showing of unique circumstances may render it unfair to dismiss an appeal because of late filing of notice." Chipser v. Kohlmeyer

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the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate; which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

& Co., 600 F.2d 1061, 1063 (5th Cir. 1979). It has also been suggested that the "matter rests largely in the discretion of the district court. If it finds excusable neglect and grants an extension, the Court of Appeals should not second-guess this determination. . ." 16 Wright, Miller, Cooper and Gresman, Federal Practice and Procedure § 3950, at 367 (1977). This standard of appellate deference to the discretion of the district court has been adopted by this Court. Cann v. Smith, 443 F.2d 352, 353 (5th Cir. 1972).

We also note that effective August 1, 1979, the Supreme Court amended Rule 4(a) to provide that the time for appeal may be extended, not only for a showing of "excusable neglect," but also for a showing of "good cause." Although that

amendment does not apply to this case since the district court made its ruling before August 1, we note that the change indicates that the standard should be interpreted flexibly. See also Chisper v. Kohlmeyer, 600 F.2d at 1063 n.2.

[2] Although the district court filed no opinion in its decision to extend the time for appeal of this motion, its decision must have been based on the fact that counsel for the defendants never even discussed a possible appeal with his clients until after the filing date had passed. Given the standard of deference accorded to district courts in these matters and the recent broadening of the standard in the Rule to promote flexibility, we cannot find that the district court abused its discretion.

II.

[3, 4] The state's primary contention on appeal is that the district court erred in holding that there is a right to counsel for indigent parents in dependency proceedings. In determining this issue, our first inquiry is whether the appellee has asserted an interest which is within the Fourteenth Amendment's protection: "[T]o determine whether due process requirements apply in the first place we must look not to the "weight" but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 841, 97 S.Ct. 2094, 2107-2108, 53 L.Ed.2d 14 (1977), (citing

Board of Regents v. Roth, 408 U.S. 564, 470-71, 92 S.Ct. 2701, 2075, 33 L.Ed.2d 548 (1972)). There can be no doubt that Ms. Davis has a constitutionally protected liberty interest at stake in the dependency proceeding--the right to family privacy or the integrity of the family unit.

As early as 1923, the Supreme Court recognized the fundamental nature of this interest when it held that the liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children." Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923); see Pierce v. Society of Sisters, 268 U.S. 510, 518, 45 S.Ct. 571, 69 L.Ed. 1070

(1925).

Following that pronouncement the Court in decisions involving various aspects of family life has accorded paramount importance to the familial relationship. See Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). This protectiveness was illustrated by the Court's decision of the nature of the interest involved in Stanley v. Illinois:

> The private interest here that of a man in the children he has sired and raised, undeniably

> warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). The fundamental right of family integrity has found protection under the Due Process Clause of the Fourteenth Amendment Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14 (1977), the Equal Protection Clause of the Fourteenth Amendment Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and the Ninth Amendment see Roe v. Wade, 410 U.S. 113, 153, 93 S.Ct.

705, 726, 35 L.Ed.2d 147 (1973). See Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972).

[5] Having determined that parents have a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment in the custody of their children we must now decide whether the process that is due a parent in a dependency proceeding includes the right to counsel. In order to make this determination, we begin with an analysis of the precise nature of the government's interest and of the private interest involved. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the

Supreme Court announced a general formula to be used in weighing these competing interests:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903.

The discussion above illustrates that a parent's interest in the custody of his or her child is among the most basic and fundamental of the liberties protected by the Constitution. Loss of a child is one of the severest possible sanctions that

can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. In addition, the determination that a parent has abused or neglected a child may lead to criminal proceedings against the parent[4], and certainly carries with it a stigma which may be as traumatizing to the parent as

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[4] See Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 959, 91 S.Ct. 1624, 1626, 29 L.Ed.2d 124 (1971) (Black, J., dissenting); Danforth v. State Department of Health and Welfare, 303 A.2d 794, 799 (Me. 1973); In re Guardianship of Dotson, 72 N.J. 112, 367 A.2d 1160, 1165 (1976); Crist v. Division of Youth and Family Services, 128 N.J.Super. 402, 320 A.2d 203, 208 (1974); Lemaster v. Oakley, 203 S.E.2d 140, 144 (W.Va. 1974); Fla.Stat.Ann. § 827.01-.07 (West 1974).

imprisonment. Since the process that is due an individual is influenced by the extent to which the person "may be 'condemned to suffer grievous loss,'" Goldburg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970), the state's interest in refusing to provide counsel in dependency proceedings must be great in order to overcome the parent's interest in protecting the family unit.

We must also consider the risk that a parent will erroneously be deprived of custody of a child under the present procedures, and the probable value of counsel in preventing an erroneous result. A careful consideration of the Florida dependency proceeding will reveal the indigent parent's need for the assistance

of counsel.[5] Section 39.09 of the Florida Statutes provides that adjudicatory hearings to determine dependency are to be conducted by the judge without a jury, applying the rules of evidence generally used in civil cases. Fla.Stat. Ann. § 39.09 (West 1974). If the petition alleging dependency is contested by the parent, the state is represented by the state attorney. Id. § 39.05. The state must prove its case by a preponderance of the evidence. Id. § 39.09. Once a child has been adjudicated

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[5] The statutes in effect at the time of the events in this action have been replaced by a new act providing for rules in dependency proceedings. Fla.Stat.Ann. §§ 39.40-.414 (West.Cum.Supp. 1979) (effective October 1, 1978). Although citations in this opinion will relate to the statutes in effect when Ms. Davis's child was adjudicated dependent, the decision we announce in this opinion is applicable to the new statutes as well.

dependent, the court retains jurisdiction until the child reaches the age 18 or is released by court order. If the court finds that the child is dependent, it may (1) place the child in his own home or the home of a relative under protective supervision; (2) commit the child to child-care agency; (3) commit the child to the temporary legal custody of the department of family services; or (4) permanently commit the child to the department of family services or to a child-placing agency. Id. § 39.11. In order to retain custody of a child after an adjudication of dependency, a parent must petition the court to return the child through a disposition hearing. See Id. 39.03(3). In a disposition hearing, the parent does not have the opportunity to relitigate the underlying adjudication

of dependency; rather, the disposition hearing is an opportunity to prove that, because of subsequent developments, restoration of custody is in the best interest of the child. While the state bears the burden of proof in an initial adjudicatory hearing, the parent seeking restoration of custody bears the burden of proof in a disposition hearing. Evidence which is inadequate to sustain a finding of dependency nevertheless may be adequate to sustain denial of a petition for restoration of custody. In Pendarvis v. State, 104 So.2d 651 (Fla.Dist.Ct.App. 1958), the Florida court refused to restore a child to the custody of its parents, holding:

> Once a child has been lawfully declared to be a dependent or delinquent child, it becomes a ward of the state and a broad discretion is vested in the

> juvenile court to do those things which appear to the court to be in the best interest of the child. The question of who is a proper person to have the care and custody of such child is not one that can be directed by the whim, fancy, or caprice of those who had the responsibility and right under God's, nature's, and man's law to nurture, care for, and support their offspring, and who by their own making have forfeited that right and cast the responsibility upon others. Evidence that may be totally inadequate to deprive a parent of the custody of his child in the first instance may be altogether adequate to support the court's refusal to restore custody to the parent once the child has become a ward of the state.

Id. at 652.

The dependency proceeding is complex in terms of the procedural, evidentiary and substantive law applicable to the hearing. In addition to this confusing legal framework, the parent is confronted with "the full panoply of the traditional

weapons of the state." Danforth v. State Department of Health & Welfare, 303 A.2d 794, 799 (Me. 1973). The state is represented by the state attorney; it has access to public records concerning the family and to the services of social workers, psychiatrists, and psychologists. Those representing the state have experience in legal proceedings and the ability to examine witnesses, present evidence, and argue skillfully that the child should be adjudicated dependent. Unrepresented parents, in contrast, will normally not cross-examine witnesses, submit evidence, call witnesses, or present a defense. They do not understand the rules of procedure or substantive law. They do not object to improper questions or move to strike improper testimony. As the trial court here found

to be true of Hilary Davis, they may not even understand the legal significance and effect of the proceedings.

Unless the indigent parent has the tools necessary to oppose the state's expert presentation, a finding of dependency could be based partially upon inadmissible hearsay, improper opinion evidence, or evidence irrelevant to the issue of dependency. A determination of dependency might be founded upon testimony that a skilled attorney would expose as biased or untrue. The parent may have a defense sufficient to prevent an adjudication of dependency, which he or she is unable adequately to present. Furthermore, once a finding of dependency is made upon such improper or insufficient evidence, the parent may face difficult problems in regaining custody of the

child. According to the court in Pendarvis, evidence which was not legally sufficient to support a finding of dependency may nonetheless be sufficient to refuse a return of the child to its parents. Thus, a parent might lose a proceeding that he would have won without the assistance of counsel, and then be unable to regain custody of the child even with the assistance of counsel.[6]

The value of counsel in a dependency proceeding is inestimable. The words of

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[6] A statistical study of dependency proceedings, published in 4 Columbia Journal of Law and Social Problems 230 (1968), showed that the assistance of counsel had a significant impact upon whether a child was placed outside the home. In 40.6% of the cases in which parents were unrepresented, children were placed outside the home, as compared with only 18.2% of the cases in which the parents were represented by counsel. Id. at 242-43.

the Court in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) explaining the need for counsel in criminal cases, are equally descriptive of the plight of a parent in a dependency proceeding:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of convic-

> tion because he does not know how to establish his innocence.

Id. at 68-69, 53 S.Ct. at 64. Just as does a defendant in a criminal case, or a child in a delinquency proceeding, the parent in a dependency hearing "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." In re Gault, 387 U.S. 1, 36, 87 S.Ct. 1428, 1448, 18 L.Ed.2d 527 (1967).

The fundamental interest of the parents implicated in dependency proceedings and the possibility of an erroneous adjudication of dependency must be balanced against any interest that the state may have in conducting summary proceedings.

The state's primary interest in conducting these proceedings is to protect the health and welfare of the child--an interest which will not be affected by the appointment of counsel for indigent parents. The only interest of the state that would be seriously affected by provision of counsel is the interest in economy. While it is certainly true that appointment of counsel for indigent parents will require additional expenditures by the state, we simply cannot agree with the state's contention that its interest in saving public money outweighs the parents' interest in not being unfairly deprived of the custody of a child. "For the State to intrude permanently or only temporarily in a manner designed to disassemble the nuclear family, society's most basic human and psychological unit

without affording counsel and guidance to a class of society's least equipped adversaries" constitutes a denial of fundamental due process.[7]

[6] Imposition of the obligation to provide counsel finds support in the decisions of the Supreme Court involving right to counsel. Development of the constitutional right to assistance of state-provided counsel began with the Court's decision in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) that an indigent defendant who is unable to make his own defense in a capital case must have appointed counsel. Id. at 71, 53 S.Ct. at 65. It is now

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[7] Crist v. Division of Youth and Family Services, 128 N.J.Super. 402, 320 A.2d 203, 210, modified, 135 N.J.Super. 573, 343 A.2d 815 (1974).

settled law that an indigent criminal defendant threatened with imprisonment is entitled to appointed counsel in both federal and state prosecutions. Argensinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Supreme Court extended the right to counsel to juveniles in delinquency proceedings. Although delinquency proceedings are considered civil rather than criminal, the serious consequences of a finding of delinquency were held to mandate the assistance of counsel. Id. at 36, 87 S.Ct. at 1448. While it is obvious that the constitutional mandate

for procedural protections increases as a proceeding approaches the nature of a criminal prosecution, the Court has rejected a rigid civil-criminal distinction in determining what process is due an individual. In McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), Justice Blackmun emphasized that the label affixed to an action would not be controlling: "Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal.' The Court carefully has avoided this wooden approach." Id. at 541, 91 S.Ct. at 1984.

We cannot accept the state's argument that the right to appointed counsel should be limited soley to cases designated "criminal." The Supreme Court has

rejected this technical approach in favor of a test which looks to the nature and impact of the proceeding. Although a dependency proceeding is denominated a civil proceeding, we find that the possible deprivation of liberty rights inherent in a dependency proceeding closely resembles the loss of liberty which attends a criminal proceeding. We therefore hold that an indigent parent in a dependency proceeding is entitled to appointment of counsel, absent a knowing and intelligent waiver of that right.[8]

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[8] In so holding, we are aligned with the great majority--all but one--of the courts that have considered this question. See Brown v. Guy, 476 F.Supp. 771, 774 (D.Nev. 1979); Smith v. Edmiston, 431 F.Supp. 941, 945 (W.D.Tenn. 1977); Potvin v. Keller, 313 So.2d 703, 705 (Fla. 1975); Danforth v. State Department of Health and Welfare, 303 A.2d 794, 795 (Me. 1973); In re Friesz, 190 Neb. 347, 208 N.W.2d 259, 260-61 (1973); Crist v. Division of Youth and

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Family Services, 128 N.J.Super. 402, 320 A.2d 203, 211, modified, 135 N.J.Super. 573, 343 A.2d 815 (1974); In re B., 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288, 290 (1972); State v. Jamison, 251 Or. 114, 444 P.2d 15, 17 (1968); Heller v. Miller, 61 Ohio St.2d 17, 399 N.E.2d 66 (1980); In re Adoption of R.I., 455 Pa. 29, 312 A.2d 601, 603 (1973); In re Welfare of Myricks, 85 Wash.2d 252, 533 P.2d 841, 842 (1975) (en banc); Lemaster v. Oakley, 203 S.E.2d 140, 145 (W.Va. 1974); Cf. Chambers v. District Court, 261 Iowa 31, 152 N.W.2d 818, 821 (1967) (statute providing right of counsel in dependency proceeding extended to require right to counsel on appeal); Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 57 (1976) (requiring provision of counsel in appeals as of right from decisions terminating parental rights); In re Guardianship of Dotson, 72 N.J.L 112, 367 A.2d 1160, 1163 (1976) (right to transcript). But see In re Cager, 251 Md. 473, 248 A.2d 384, 391 (1968) (parent not entitled to counsel at public expense.)

In addition to these court decisions, the majority of states now have statutes which provide a right to counsel for indigent parents in dependency proceedings. See, e.g., Ala.Code.tit. 12, § 15-63(b) (1975); Ariz.Rev.Stat. § 8-225 (Cum.Supp. 1979); Cal.Civl.Code § 237.5 (Cum.Supp. 1980); Colo.Rev.Stat. § 19-1-106(1)(b)(ii)(1973); Ill.Rev.Stat.

We also note that the equal protection clause of the Fourteenth Amendment supports a rule requiring the provision of counsel to indigent parents in dependency proceedings. In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the Supreme Court held that the equal protection clause requires the state to furnish fee transcripts to indigent criminal defendants who appeal

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ch. 37, § 701-20(1) (Cum.Supp. 1979); Ind.Code § 34-1-1-3 (1973); Iowa Code § 232.28 (1969); Me.Rev.Stat. tit. 22, § 3792 (Supp. 1979); Md.Cts. & Jud.Proc. Code Ann. § 3-821 (Cum.Supp. 1979); Mass.Gen.Laws Ann. ch. 119, § 29 (Cum.Supp. 1980); Minn.Stat. § 260.155(2) (1971); Nev.Rev.Stat. § 62.195 (1979); N.J.Stat.Ann. § 9.6-8.43 (Cum.Supp. 1979); N.M.Stat.Ann. § 32-1-27F (1978); N.D.Cent.Code § 27-20-26 (1974); Ohio Rev.Code Ann. § 2151.352 (Page 1976); Okla.Stat. tit. 10, § 1109 (Cum.Supp. 1979); Ore.Rev.Stat. § 419.498 (1979); S.D. Complied Laws Ann. § 26-8-22.2 (1976); Va.Code § 16-1-226(c)(2) (Cum.Supp. 1979); Wis.Stat.Ann. § 48.23 (West 1979).

their convictions. Id. at 19, 76 S.Ct. at 590. Subsequently, the Court expanded this ruling to hold that a state must furnish counsel to incarcerated indigent criminal defendants in appeals provided of right. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefits of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, . . . is forced to shift for himself." Douglas v. California, 372 U.S. 353, 357-58, S.Ct. 410, 30 L.Ed.2d 372 (1971), the Court extended the Griffin rationale to criminal appeals involving only a fine. The Court rejected the city's argument that Griffin should be limited to cases in which a defendant is sentenced to

confinement. The Court feld that this argument misconceived the principle set forth in Griffin--that invidious discrimination exists when an effective appeal is made available only to those who can afford the appeal. Id. at 196-97, 92 S.Ct. at 415-16. The Court also emphasized the practical effects and serious collateral consequences that may attend imposition of a fine in a criminal proceeding. Id. We have already discussed that the child dependency proceeding "by its very nature resembles a criminal prosecution," Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 959, 91 S.Ct. 1624, 1626, 29 L.Ed.2d 124 (1971) (Black, J., dissenting). Given the nature of the proceeding and the severe consequences of an adjudication of dependency, we find these cases supportive of the requirement

that an indigent defendant be provided the same tools that a more prosperous parent would have to defend against the threatened deprivation by the state.[9]

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[9] We also find support for our decision in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the first Supreme Court case to find a constitutional right to assistance in a purely civil case. In that case, the Court held that a state could not limit the access of an indigent to court by requiring that a filing fee be paid in order to obtain a divorce. Id. at 382-83, 91 S.Ct. at 788. Emphasizing the basic and fundamental nature of the marriage relationship in society, and the state monopoly of the means to end the relationship, the Court held that a person could not be prevented from obtaining a divorce because of inability to pay the filing costs. The Court later refused to extend the principle in Boddie to allow indigents access to bankruptcy court, United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973), or to appeals from welfare reduction decisions, Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973). Although Boddie has been strictly limited to its facts, we find that distinction supportive of our holding here. Here, as in Boddie, the state controls a fundamental human

See Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 61 (1976).

III.

The state urges that, if this Court finds a right to counsel in dependency proceedings, it should adopt the case-by-case method of Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) for determining whether counsel should be appointed. Because we believe that the case-by-case method is unworkable, we hold instead that an indigent parent in a dependency proceeding has an absolute right to counsel absent a knowing and intelligent waiver of that right.

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relationship; that relationship should therefore be accorded a very special treatment and protection to ensure that the state does not unfairly deny the individual the control of that relationship.

In holding that the right to counsel should be determined upon the facts of each case, the court in Cleaver adopted the same approach which was rejected in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as inappropriate for use in criminal cases. Rejecting the rule established in Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) that the right to counsel was to be tested "by an appraisal of the totality of facts in a given case," id. at 462, 62 S.Ct. at 1256, the Gideon Court held that criminal defendants have an absolute right to the assistance of counsel. 372 U.S. at 344, 83 S.Ct. at 796, The Court has also followed the principle of Gideon in finding that there is an absolute right to counsel in juvenile delinquency proceedings, In re Gault,

387 U.S. 1, 41, 87 S.Ct. 1428, 1451, 18 L.Ed.2d 527 (1967), and sex offender proceedings, Specht v. Patterson, 386 U.S. 605, 611, 87 S.Ct. 1209, 1213, 18 L.Ed.2d 326 (1967).

Despite this compelling precedent, the state urges tht we follow the Supreme Court's approach in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), which held that the right to counsel in probation or parole revocation hearings should be determined on a case-by-case basis. This argument overlooks, however, the basis upon which the Gagnon court distinguished the rule requiring an absolute right to counsel in criminal proceedings. Recognizing that the case-by-case method had been rejected for use in criminal trials, the Court held that Gideon was not controlling because of the

following "critical differences between criminal trials and probation or parole revocation hearings:"

> In a criminal trial, the State is represeented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases.

Id. at 789, 93 S.Ct. at 1763. The Court agreed that, under the case-by-case

approach, there would be cases in which a lawyer would have been helpful but would not be appointed, but felt that this possibility was permissible since the interest at stake in revocations hearings was the "more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime." Id. We could find no more persuasive support for imposition of an absolute right to counsel than the reasoning of the court in Gagnon. The exact factors that the Court notes as requiring an absolute right of counsel in criminal cases are also present in dependency proceedings--in opposing counsel, formal rules of evidence, procedural rights, and an adversarial format. Furthermore, in Gagnon, use of the case-by-case method was justified partially because of the

limited due process rights of parents in child dependency proceedings, however, are among the most fundamental and basic of those guaranteed by the Fourteenth Amendment.

In arguing for adoption of the case-by-case method, the state relies heavily on the fact that, in some dependency proceedings, parents may not wish to contest a dependency proceeding. The Florida statute defines "dependent child" to include a child who:

> (a) Has been abandoned by his parents or other custodians.
>
> (b) For any reason, is destitute or homeless.
>
> (c) Has not proper parental support, maintenance, care, or guardianship.
>
> (d) Because of the neglect of his parents or other custodians, is deprived of education as required by law, or of medical, psychiatric, psychological, or

other care necessary for his well-being.

(e) Is living in a condition or environment such as to injure him or endanger his welfare.

(f) Is living in a home which, by reason of the neglect, cruelty, depravity, or other adverse condition of a parent or other person in whose care the child may be, is an unfit place for him.

(g) Is surrendered to the division of family services or a licensed child-placing agency for purpose of adoption.

Fla.Stat.Ann. § 39.01(1) (West 1974). Dependency proceedings may also be instituted by the state to determine the disposition of a "child in need of supervision," which includes a child who: "(a) Being subject to compulsory school attendance, is truant from school. (b) Persistently disobeys the reasonable and lawful demands of his parents or other custodians and is beyond their control.

(c) Has run away from his parent or custodian." Id. The State contends that counsel is unnecessary when parents voluntarily consent to surrender a child either temporarily or for adoption, or when parents consent to the state's supervision over an uncontrollable child. It is true that, in some of these instances, parents will be fully aware of the effect and significance of the dependency proceeding, and in full agreement with the proceedings. Obviously, an attorney is not necessary in such cases. Hilary Davis' case is an excellent example, however, of the desirability of a rule which would impose an absolute right to counsel which parents may waive if counsel is not desired. The state has termed Hilary Davis' action a "voluntary relinquishment" of the custody of her

child. According to the state, she consented to the state's custody of the child and therefore, under the proposed "case-by-case" method, did not need an attorney. Yet Ms. Davis, in "voluntarily" relinquishing her child, suffered a grievous loss because of her lack of understanding of the consequences of the proceeding. The trial court found that she was under the impression that her child would be taken for a short period of weeks, until she was able to support herself and the child. She little suspected that her child was to be taken until he reached the age of 18, or until she proved, in a hearing at which the burden was on her, that she should regain custody. The advice of an attorney would have prevented this regrettable result. It is clear that counsel is often needed,

even in the state's "non-adversarial," "voluntary," dependency proceedings. Of course, it is likely that parents in some dependency proceedings will not require counsel. When that situation arises, a parent may make a knowing, intelligent, waiver of the right to counsel, and the state will be spared the expense. In view of the potential loss and the complex nature of dependency proceedings, a knowing waiver of counsel in cases where counsel is unnecessary is a far better rule than to adopt a case-by-case approach which, as illustrated by the instant case, may often be ineffective.

We must not lose sight of the fact that the real issue in this case is the extent to which poverty can be allowed to interfere with this nation's commitment to equal justice for all. We realize

that it cannot be said there is meaningful access to the judical process until all serious litigants are represented by counsel. The Supreme Court has recognized ever since Edwards v. California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941) that a vision of equal justice demands that the poor have an opportunity to receive the same treatment in the courts as the wealthy. As discussed previously, we come to the realization that there is an obligation in the court "to lift the handicaps flowing from differences in economic circumstances," Griffin v. Illinois, 351 U.S. 12, 34, 76 S.Ct. 585, 598, 100 L.Ed. 891 (1956) (Harlan, J., dissenting when litigants appear before us.[10]

[10] See Clone, "The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment," 1975 Sup.Ct.Rev. 289.

Thus, we are only recognizing here the principle laid down by the Court in Edwards almost forty years ago. A judicial system is not fair which has a build in opportunity for the rich to receive a different treatment than the poor. A judicial system is not equitable or consistent when counsel is provided in criminal cases but not in child custody proceedings.

[7] We agree with the holding of the district court that, upon the filing of a petition for an adjudication of dependency, a parent must be informed that he has a right to counsel immediately following service of the petition or seizure of the child. The right to counsel may be relinquished by a "knowing and intelligent" waiver following notice of the right to counsel. As a final point of

appeal, the state contends that the district court erred in awarding attorney's fees under 42 U.S.C. § 1988 against a state court judge. The Supreme Court has recently heard argument in a case involving this precise issue, see Supreme Court of Virginia v. Consumer's Union, ___ U.S. ___, 100 S.Ct. 226, 62 L.Ed.2d 168, (1980), and therefore we do not reach this issue. The Court's decision in that case will instruct the district court which will consider the issue on remand.

The judgment is AFFIRMED in all respects expect as to the award of attorney's fees. On that issue the Court will act in conformity with the decision of the Court in Supreme Court of Virginia v. Consumer's Union, supra.

JOHN R. BROWN, Circuit Judge, concurring in part and dissenting in part:

Once again this Court in the high name of the Constitution becomes involved by the majority in the most direct way in domestic problems wisely left to the states.[1] Not only that, it is done by an order declaring unconstitutional prior decisions of the state's highest tribunal through the medium of an attack directed against innocent local state trial circuit judges, all of whom--including all other judges high and low in the whole state of Florida--are now categorically directed, without discretion or consideration of real needs, to conform to our edict. Worse, this all comes about be-

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[1] See Drummond v. Fulton County Dept. of Family and Children's Services, 563 F.2d 1200, 1212 (5th Cir. 1977) (en banc) (Brown, C. J., concurring).

cause of the possible or likely error one of the judges made in his handling of a single specific case.

More than that, this has all of the earmarks of a carefully contrived failure to use available Florida procedures for a timely review of that supposed error in the hope--which materialized--that this would set the stage for Federal intrusion.

I think all of the principles of Federalism and the demands of comity are defeated by this action and I therefore dissent from this intrusion. Once we embark on this constitutional quest I concur some relief was justified, but not the blunderbuss which freezes for all time and all Florida judges the procedure which must be followed in handling all such cases.

I concur in the affirmance of the District Court judgment only because I agree that Mrs. Davis should have been appointed counsel at the child's dependency hearing. However, the strictest rule I would impose on Florida judges concerning the appointment of counsel to indigent parents in state dependency proceedings would be the rule of the Ninth Circuit enunciatred in Cleaver v. Wilcox, 499 F.2d 940 (1974) and already adopted by the Florida Supreme Court in Potvin v. Keller, 313 So.2d 703 (Fla. 1975). The need for counsel should be determined on a case by case basis, considering such factors as the length of potential separation of the parent and child, the presence or absence of parental consent or disputed facts, and the parent's ability to present his or her case, to deal with

documents and to examine witnesses. The Judge's reasons for denial of counsel should be stated in the record to ensure meaningful judicial review. Cleaver, supra, 499 F.2d at 945.

Applying the Cleaver factors to this case, I feel that the State Circuit Court judge who presided over this dependency hearing was wrong in not appointing counsel for Mrs. Davis. The length of potential separation of mother and child was very long; moreover, Mrs. Davis did not even understand that her child could be taken away from her for more than a few weeks. She consented to the taking of her child but this was only because she totally misunderstood the nature of the proceedings and was ignorant of any other options available to her. She was completely intimidated at the proceeding

and unable to present her case.

But the mistake was a single incident of abuse of judicial discretion. It does not indicate a system in Florida so flawed that it cannot deal in general with the problem of appointing counsel in child dependency proceedings. In the Interest of R.W.H., 375 So.2d 321 (Fla. App. 1979), is a recent Florida decision demonstrating that the case by case method of Cleaver, as used in Florida courts, does work to ensure parents legal representation when they need it.

My main misgiving about the majority's holding today concerns what I believe to have been an abuse of discretion on the part of this Court and the District Court, in hearing this case in the first place. In view of all the facts, and traditional notions of comity, it would

have been more prudent to leave the ultimate disposition of this case to the Florida State courts.

The Florida Circuit Court order adjudicating Carl Thor Davis a dependent of the state was entered on March 9, 1976. Under Florida law, Mrs. Davis' proper remedy would have been a direct appeal to the Florida Court of Appeals. Fla.Stat. Ann. § 39.14 (West 1974) (current version at Fla.Stat.Ann. § 39.413 (West Supp. 1979)). The Florida Appellate Rules, Rule 3.2(b) (West 1967) provides sixty days from the "rendition of the final decision, order, [or] judgment" in which to prosecute an appeal. Although the reviewing court has no jurisdiction to hear a case after the time for appeal has expired, Ramagli Realty Co. v. Craver, 121 So.2d 648 (Fla. 1960), opinion con-

formed to, 123 So.2d 404 (Fla.App. 1960), all that is necessary to commence an appeal is the filing of a notice of appeal and the deposit of a filing fee. Rule 3.2(a). Hall v. Florida State Department of Public Welfare, 226 So.2d 39, 40 (Fla. App. 1969) makes it eminently clear that in Florida, habeas corpus is no substitute for a direct appeal from a Juvenile Court adjudication of the dependency of a child, even if the time for appeal has expired.[2]

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[2] Mrs. Davis' counsel rely on a footnote in Potvin v. Keller, supra, in which the Florida Supreme Court declines to follow Hall:

> 2. While habeas corpus is not available as a substitute for an appeal of the juvenile court's order. Hall v. Florida Dep't of Pub. Welfare, 226 So.2d 39 (4th Dist.Ct.App.Fla. 1969), it is available as a remedy if the trial court's adjudication of dependency was unconstitutional. Richardson v. State ex rel. Milton, 219 So.2d 77

(3d Dist.Ct.App. Fla. 1969).

To take this footnote literally would lead to circuitous reasoning which would put undue emphasis on the ultimate outcome of the petition for habeas corpus. This remedy would be proper, and the failure to make a timely appeal irrelevant, only if the petitioned Court found a constitutional violation to exist. If no constitutional violation were found to justify the granting of a writ of habeas corpus, a petitioner who relied exclusively on this footnote, ignoring the Hall admonition to make a timely appeal, would be out of luck. Only hindsight is twenty-twenty.

Mrs. Davis does not propose that the above interpretation of the footnote, a kind of Russian roulette, is the correct interpretation. Her interpretation goes to the other extreme to accommodate the latecomer to the Florida Court of Appeals. She argues that any time a habeas corpus petitioner waives the constitutional violation flag--and this will be almost every time such a petition is filed--the rule of Hall is inapplicable. I do not believe the Supreme Court of Florida meant essentially to overrule Hall in a footnote.

Mrs. Davis did not understand at the time the full import of the adjudication of dependency of her child and was not informed of her right to appeal. Yet the Judge presiding at the dependency hearing did tell her to retain counsel and to inform that counsel of what had transpired. If her diligence in trying to obtain counsel before the hearing is any indication of her diligence afterwards, sixty days should have been enough time to find an attorney. Her petition in Federal District Court, however, states that her "counsel ascertained that an order adjudicating the child dependent had already been entered and that the time for appealing the order of March 9, 1976, had lapsed."

Yet her attorneys managed to file a petition for writ of habeas corpus on May

11, 1976, just two or three days after the time for appeal had passed. Nowhere does the record disclose the exact date on which Mrs. Davis actually retained counsel. Perhaps Mrs. Davis finally found an attorney the day after the sixty days for appeal had lapsed, and perhaps the diligent attorney, forced to seek the only viable alternative to appeal, immediately filed a petition for a writ of habeas corpus in the Florida Supreme Court. But I think a more logical interpretation of the facts was that Mrs. Davis' counsel carefully chose the state habeas corpus route because it was more likely to give a negative result on direct appeal, thereby giving petitioner the right to claim she had exhausted her state remedies and was entitled to seek Federal habeas corpus relief.

Under no circumstances am I implying that Mrs. Davis had failed legally to exhaust her state judicial remedies. Clearly the time for direct appeal had expired when she filed for Federal habeas corpus. And no matter what tactical maneuvers her attorneys may or may not have been planning, she did not knowingly and deliberately bypass the right to follow the correct state procedures. Fay v. Noia, 372 U.S. 391, 438-40, 83 S.Ct. 822, 848-849, 9 L.Ed.2d 837, 868-70 (1963).

Nor do I suggest, contrary to Monroe v. Pape, 365 U.S. 165, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), a general rule of exhaustion of state remedies in order to bring a § 1983 action in Federal Court. However, I believe that since Mrs. Davis was seeking the release from custody of

her son, Prieser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), controls to make her only possible remedy in Federal Court habeas corpus, and that claim may well have been moot had she followed the proper state court procedures.

I simply do not think either this Court or the District Court should have entertained this cause which I think was carefully choreographed to force a Federal ruling on the constitutionally of a procedure inherently based on the discretion of the Judges of another sovereign.

Domestic relations is an area of law in which Federal Courts traditionally have deferred to State Courts. Sosna v. State of Iowa, 419 U.S. 393, 404, 95 S.Ct. 553, 559, 42 L.Ed.2d 532, 543

(1975); DeSylva v. Ballentine, 351 U.S. 570, 580, 76 S.Ct. 974, 979, 100 L.Ed. 1415, 1427 (1956); Bell v. Bell, 411 F.Supp. 716 (W.D.Wash. 1976). Federal Courts have always preferred to abstain from answering questions of law, such as those contained in domestic relations suits, which the states are by nature best equipped to deal with. See Harris County Commissioners Court v. Moore, 420 U.S. 77, 83-84, 95 S.Ct. 870, 874-875, 43 L.Ed.2d 32, 39 (1975); Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1942).

In this case, this Court imposes on the state legal system a hard and fast rule. They tell the Florida Circuit Judges that they are not capable of deciding when an indigent parent present at dependency hearing is in need of

counsel, and worse, through the medium of local state trial judges, as the target of § 1983, we declare that the Supreme Court of Florida's rule is unconstitutional for all time and for all circumstances. The state judges have no choice but to appoint counsel in every case.

Although Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1941) was overruled by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), I do not think that the notion of deference to state courts in the interpretation of their own laws, expressed in Betts, 316 U.S. at 472, 62 S.Ct. at 1261, 86 L.Ed. at 1607 has ever been dismissed as no longer important. In Gideon, the Supreme Court decided, not that comity was an insignificant concern for Federal Courts, but that it was outweighed by a

more powerful Federal concern in that case, the fundamental right to counsel in a state criminal prosecution, guaranteed by the Sixth Amendment through the Fourteenth Amendment.

Every case on which majority today relies in support of its holding of an absolute right to counsel for parents in a child dependency proceeding, is a criminal case involving the Sixth Amendment, or at least a case involving the potential confinement of the person to whom the absolute right to counsel is granted. I cannot disagree that the right of a parent to retain custody of his children is one of the most important rights implicitly recognized by the Constitution. But it is not quite the same constitutional dimensions as an individual's right to his own liberty. It is not an

interest which can outweigh the concerns of federalism and of state and federal comity. Therefore, I cannot agree with the holding of the majority--that an indigent parent has an absolute constitutional right to an attorney in a juvenile dependency proceeding.[3]

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[3] Although I agree with majority that the issue of liability of the state court judge for attorney's fees under 42 U.S.C.A. § 1988 should not be decided until we hear what the Supreme Court has to say in Supreme Court of Virginia v. Consumer's Union, I make one comment. I do not see how a judge, whose absolute immunity to liability always has been accepted at common law, should be liable--in this case where he was acting in good faith, in his judicial capacity, and in accordance with the most recent decision of his State's Supreme Court, Potvin v. Keller, supra. It matters not to me what great principles the Supreme Court announces in Consumers Union. Under no circumstance should these judges (or in a derivative sense the state of Florida) be compelled to pay monetary penalties for what, at most, was a judicial error. To shield the judges by saying that the state, not they, will pay still means that civil penalty is imposed

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on the judges, or the state judiciary because their judicial pronouncements do not jibe with that of a single federal judge, affirmed by two more.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 78-2063

HILARY DAVIS, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

versus

WILLIAM J. PAGE, JR., ETC., ET AL.,

Defendants,

CIRCUIT JUDGES DIXIE HERLONG CHASTAIN, ETC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC (Opinion _____, 198__, 5 Cir., 198____, _____F.2d_____).

(July 8, 1980)

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Hilary DAVIS, Individually and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

William J. PAGE, Jr., Etc. et al., Defendants,

Circuit Judges Dixie Herlong Chastain, Etc. et al., Defendants-Appellants.

No. 78-2063.

United States Court of Appeals, Fifth Circuit.

March 23, 1981.

Mother filed a petition for a writ of habeas corpus seeking the return of a child committed to the temporary custody of the Florida Department of Health and Rehabilitative Services in dependency proceedings. The United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., 442 F.Supp. 258, rendered summary judgment for the mother. A panel of the Court of

Appeals, 618 F.2d 374, affirmed. On rehearing en banc, the Court of Appeals, Vance, Circuit Judge, held that, in a formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made.

Affirmed in part, vacated and reversed in part.

Brown, Circuit Judge, filed a dissenting opinion in which Coleman, Ainsworth, Charles Clark, Roney, Gee, Tjoflat, Hill, Garza, Henderson and Reavley, Circuit Judges, joined.

1. Habeas Corpus K.45.3(1)

Petition for writ of habeas corpus seeking return of child committed to

temporary custody of Florida Department of Health and Rehabilitative Services was not barred by doctrine of Younger v. Harris, because at time mother filed her federal action, state adjudicatory proceeding had been completed and mother had exhausted remedies available to her under Florida law; comparatively informal disposition hearings, in which state no longer carried burden of proof, were not continuation of adjudicatory proceeding. West's F.S.A. § 39.41(1).

2. Habeas Corpus K.89

If habeas jurisdiction exists at outset of case, it is not defeated by applicant's subsequent release from custody.

3. Habeas Corpus K.89

Mother of child committed to temporary custody of state was entitled to invoke federal habeas corpus jurisdiction to

seek return of child; return of child to his mother before district court rendered judgment did not moot habeas claim, since child was still under continuing supervision of state, entailing parental visits with social worker, social worker's inspection of mother's home and permission to social worker to exercise general supervisory authority over mother's parental decisions and actions.

4. Constitutional Law K.255(4)

Infants K.205

In formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that indigent parent be offered counsel and that counsel be provided unless knowing and intelligent waiver is made. West's F.S.A. §39.41(1).

5. Parent and Child K.2(14)

State is not required to provide counsel when two purely private parties litigate issue of child custody.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, BROWN, COLEMAN, AINSOWRTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.*

VANCE, Circuit Judge:

This class action challenged the constitutionality of child dependency proceedings against indigent parents in the

*Judge Sam D. Johnson did not participate in this decision.

Circuit Court of Dade County, Florida, when parents are not provided with counsel at the state's expense. The district court granted summary judgment to the plaintiff. Davis v. Page, 442 F.Supp. 258 (S.D. Fla. 1977), and a panel of this court affirmed except as to the issue of attorneys' fees. Davis v. Page, 618 F.2d 374 (5th Cir. 1980).

On January 30, 1976, Hilary Davis left her home after her husband broke the arm of her 14-month old baby, Carl Davis. She took her son to a hospital where they both spent the night. The next day, after telling social workers at the hospital that she was leaving her husband and would seek a divorce, she was informed that she would not be permitted to take her son with her. A few days later, the Florida Department of Health and Rehabil-

tative Services (DHRS) filed dependency proceedings in the Juvenile and Family Division of the Circuit Court seeking to remove Carl from her custody. At an emergency hearing on February 4, the judge advised Ms. Davis to have counsel at the adjudicatory proceeding a month later. He made no offer to appoint counsel. Ms. Davis was indigent, and although she repeatedly attempted to secure counsel, her efforts were unsuccessful.

The adjudicatory hearing proceeded in accordance with Fla.Stat. §39-408(1)(b).[1] Such hearing are formal adver-

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[1] The statutes in effect at the time of the events in this action have been replaced by a new act providing for rules in dependency proceedings. The citations in this opinion refer to the current statute. The provisions cited are substantially the same in both acts.

sary proceedings. The state is represented by counsel and is required to prove its case by a preponderance of the evidence under the rules of evidence generally applicable to civil proceedings.

At the adjudicatory hearing, Carl Davis was declared to be a dependent child and was committed to the temporary custody of DHRS.[2] Although Ms. Davis mistakenly believed that she would be separated from Carl for only a few weeks, the phrase "temporary custody" belies the serious consequences of an adjudication of dependency. Temporary custody

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[2] Once a child has been adjudicated dependent the court may (1) place the child in his own home or the home of a relative under protective supervision; (2) commit the child to a licensed child-care agency; (3) commit the child to the temporary legal custody of DHRS; or (4) permanently commit the child to DHRS or a licensed child-placing agency. Fla.Stat. § 39.41(1).

continues until terminated by the court or until the child reaches the age of 18. Fla.Stat. § 39.41(1)(c). While a parent may petition to regain custody of his or her child, the nature of subsequent proceedings differs significantly from the original adjudication hearing. In these proceedings, known as "disposition hearings," the state no longer bears the burden of proof. Compare Fla.Stat. § 39.408(1)(b) with Fla.Stat. § 39.408(2) and Fla.Stat. § 39.41. "Evidence that may be totally inadequate to deprive a parent of the custody of his child in the first instance may be altogether adequate to support the court's refusal to restore custody to the parent once the child had become a ward of the state." Pendarvis v. State, 104 So.2d 651, 652 (Fla.Dist. Ct.App. 1958). Evidence may be admitted

at disposition hearings which would be inadmissible at an adjudicatory hearing. Fla.Stat. § 39.408(2).

Ms. Davis was not advised by the judge at the adjudicatory hearing of her right to appeal under Fla.Stat. § 39.413. After the 30-day appeal period had expired, she retained counsel. On May 11, 1976, she filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court seeking the return of her son. The Florida Supreme Court denied her petition without opinion and this litigation followed.

[1] At the outset, we note that jurisdiction is properly founded on 28 U.S.C. § 2241 et seq. and 28 U.S.C. § 1343(3) and (4). Appellants argue, for the first time in this litigation, that the action should be dismissed under the doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct.

746, 27 L.Ed.2d 699 (1971). We disagree. At the time she filed her federal action, the adjudicatory proceeding had been completed and Ms. Davis had exhausted the remedies available to her under Florida law. The comparatively informal disposition hearings, in which the state no longer carries the burden of proof, are not a continuation of the adjudicatory proceeding. The parent may not relitigate the original adjudication. Since this action did not seek to enjoin a state proceeding but sought rather to vacate a previous judgment, the considerations of comity and federalism that underlie the Younger doctrine do not require the federal courts to abstain from taking jurisdiction of Ms. Davis' claim. Compare the present case with Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60

L.Ed.2d 994 (1979) (suit seeking to enjoin child custody proceeding barred by Younger).[3]

[2, 3] Ms. Davis was also entitled to invoke federal habeas corpus jurisdiction. The state does not question that at the time this federal action was

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[3] Appellants have not urged us to consider whether judicial immunity bars declaratory or injunctive relief and we do not. Cf. Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572 (1980) (qualified immunity to a § 1983 action is a defense and burden of pleading rests with defendant). See generally, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 735 n. 13-14, 100 S.Ct. 1967, 1976 & n. 13-14, 64 L.Ed.2d 641 (1980) (discussing applicability of judicial immunity in § 1983 actions for declaratory or injunctive relief). Neither have appellants argued that judges are not appropriate defendants in an action to declare a statute unconstitutional, and we express no opinion on that question. We do not raise it sua sponte because injunctive relief against the defendants was also sought.

filed, Carl Davis was in custody pursuant to state judgment. It argues, however, that since the state court returned Carl to his mother before the district court rendered judgment, the habeas claim had became moot. This contention lacks merit. If habeas jurisdiction exists at the outset of a case, it is not defeated by the applicant's subsequent release from custody. Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 1559, 20 L.Ed.2d 554 (1968). In addition, the state court order returning Carl placed him under the continuing supervision of DHRS. Ms. Davis had to visit regularly with her social worker, permit her social worker to exercise general supervisory authority over her parental decisions and actions. See Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285

(1963) (parolee "in custody" within meaning of habeas statute in view of significant restraints on liberty even after release from prison). We decline the state's invitation to declare habeas relief inappropriate whenever the custody of a child is at stake. While domestic relations are normally within the province of state courts, nothing in the history of the habeas writ suggests that it should be denied merely because the custody at issue results from an adjudication involving child custody.[4] See

[4] Indeed, the common law offers examples of the use of the habeas writ in child custody cases. See discussion in Jones v. Cunningham, 371 U.S. 236, 239, 83 S.Ct. 373, 375, 9 L.Ed.2d 285 (1963). It is also, of course, clear that the usual deference to state courts in domestic law questions will not bar federal review of constitutional issues. See e.g., Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953).

Lehman v. Lycoming County Children's Services Agency, (3d Cir. July 23, 1980). But see Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978).

[4] We turn now to the central question of this appeal, whether the failure to offer Ms. Davis the assistance of counsel violated constitutional requirements of due process.

It is not questioned that Ms. Davis and similarly situated parents have a liberty interest at stake in the child dependency hearings that is protected by the due process clause of the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). The Supreme Court has recognized the right to family integrity and autonomy in a number of con-

texts. See e.g., Cleveland Board of Education v. LaFleur, 414 U.S. 532, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

To determine whether due process in this case includes the right to counsel, we must examine more precisely the weight of the liberty interest presented by the plaintiff and the competing interests asserted by the government. The Supreme Court has noted that three distinct factors are involved in such a determination:

> First, the private interest that will be affected by the official action; second, the risk of an

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v . Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

We consider first Ms. Davis' interest in the dependency proceeding. The process to which she is entitled is determined in part by the extent to which she may be "condemned to suffer grievous loss." Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). It is difficult to imagine a loss more grievous than that of a parent deprived of his or her child. The bond between parent and offspring is one of the central facts of nature as well as of

society, and the Supreme Court has frequently noted the fundamental character of this relationship. The interest of a parent in raising his or her child has been described as "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), and "far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953). As the Court stated in Stanley v. Illinois, 405 U.S. at 651, 92 S.Ct. at 1212, "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" The recognized weight of Ms. Davis' interest

demands that she receive the full procedural protection necessary to avoid the erroneous deprivation of that interest.

Our next inquiry thus becomes whether the provision of counsel is likely to alleviate significantly the risk that a child will erroneously be found dependent. The facts of this case testify to the inadequate protection afforded to a fundamental liberty interest when a parent, unfamiliar with the judicial process and easily intimidated by its workings, opposes the legal apparatus of the state. Ms. Davis was ignorant of the substantive governing law, unaware even that the dependency hearing might result in an indefinite separation from her child. Unacquainted with the rules of evidence, she was unable to challenge hearsay and opinion testimony. The trial

judge found that "[s]he sat silently through most of the hearing . . . fearful of antagonizing the social workers" and that she "was little more than a spectator in the adjudicatory proceeding." Davis v. Page, 442 F.Supp. at 260. This case is far from unique.[5] The assistance of counsel is needed "to cope with problems of law, to make skilled inquiry into the facts [and] to insist upon regularity of the proceedings . . ." In re Gault, 387 U.S. 1, 36, 87 S.Ct. 1428, 1448, 18 L.Ed.2d 527 (1967) (footnote

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[5] See e.g., In re A.Z., 383 So.2d 934 (Fla.Dist.Ct.App. 1980), which described an adjudicatory hearing in which the court conducted the questioning of the witnesses, none of whom were placed under oath, and did not permit the parent to question witnesses. The court in the case described relied on various written reports, none of which were identified, authenticated or placed in evidence, and none of which were furnished to the parent.

omitted).

Finally, we must examine the countervailing interests asserted by the state. Insofar as the state appears in dependency proceedings in its role as parens patriae, it shares the interest of parent and child in taking all measures which will significantly decrease the likelihood of an erroneous decision. The state argues, however, that the financial cost of offering counsel to indigent parents in these proceedings outweighs the value of the protection provided by counsel. We disagree. Where the right to counsel is essential to the protection of a liberty so basic to the fabric and philosophy of our society, the interest in saving an uncertain sum will not defeat that right.

Although the state urges us to accept

the case-by-case method used by the Florida courts to determine when to provide counsel, we believe that the facts of this case dramatically illustrate the pitfalls of such an approach. The factors by which Florida courts decide whether to offer counsel are often unknowable in advance of the proceeding.[6] In our view of the complexity of these proceedings always necessitates the offer of counsel to avoid the erroneous deprivation of a fundamental liberty interest. The right involved is absolute and

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[6] In Potvin v. Keller, 313 So.2d 703, 706 (Fla. 1975), the Florida Supreme Court announced five factors to be considered in determining whether counsel is necessary: (1) the potential length of parent-child separation; (2) the extent of restrictions on parental visitation; (3) the presence or absence of parental consent; (4) the presence or absence of disputed facts; (5) the complexity of the proceeding in terms of witnesses and documents.

should not be subject to the discretion of trial judge. We thus hold that in a formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made.[7]

In so holding, we draw support from Supreme Court rulings that have mandated the offer of counsel when fundamental liberty interests have been at stake. Some of these have involved criminal prosecutions. See e.g. Argersinger v.

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[7] Our holding today does not affect the state's ability to remove a child from his or her home temporarily in an emergency situation where life or safety is immediately threatened.

Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). In In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), Court ordered that counsel be provided in juvenile cases denominated civil proceedings because the deprivation of liberty threatened was comparable to that involved in adult criminal proceedings. The interest in family integrity is one comparable to the interest in being free of restraint. To offer counsel when a single day in jail may be at stake, but to deny counsel to an indigent when the destruction of his or her family is threatened, does not

accord with our concept of due process.[8]

We note also that the great majority of courts that have considered the issue have found a right to counsel in proceedings where prolonged or permanent

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[8] We find the liberty interest in this case to be more comparable to that in In re Gault, than to those involved in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (holding that a probationer's right to counsel in a probation revocation proceeding is to be determined on a case-by-case approach for prison disciplinary proceedings) and Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (adopting the case-by-case approach for prison disciplinary proceedings.) The proceedings in these cases involved the conditional liberty interest of a defendant who has already been adjudicated a criminal in a proceeding where he was entitled to representation by counsel. Also, the Court specifically relied on the fact that the proceedings in Gagnon and Wolff were not adversary in nature. Indeed, the state was not represented by counsel. The contrast on both these points with the proceeding before us is unmistakable.

separation of parent and child is threatened,[9] and that the majority of states have recognized the essential role of counsel in these hearings by enacting statutes which provide a right to counsel

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[9] See e.g. Smith v. Edmiston, 431 F.Supp. 941 (W.D.Tenn. 1977); Danforth v. State Department of Health and Welfare, 303 A.2d 794 (Me. 1973); In re Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973); Crist v. Division of Youth and Family Services, 128 N.J.Super. 402, 320 A.2d 203, modified, 135 N.J.Super. 573, 343 A.2d 815 (1974); In re B., 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972); In re Mitchell, 251 Or. 114, 444 P.2d 15 (1968); State ex rel. Heller v. Miller, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980); In re Adoption of R.I., 455 Pa. 29, 312 A.2d 601 (1973); In re Welfare of Myricks, 85 Wash.2d 252, 533 P.2d 841 (1975); State ex rel. Lemaster v. Oakley, 157 W.Va. 590, 203 S.E.2d 140 (1974); Annot., 80 A.L.R.3d 1141 (1977). See also, Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) (mandating a case-by-case determination of the need for counsel); Brown v. Guy, 476 F.Supp. 771 (D.Nev. 1979). But see, In re Cager, 251 Md. 473, 248 A.2d 384 (1968).

for indigent parents.[10]

[5] Finally, it should be clear that this decision in no way obliges the State of Florida to provide counsel when two

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10 See e.g., Ala.Code tit. 12, § 15-63(b) (1975); Ariz.Rev.Stat.Ann. § 8-225 (Cum.Supp. 1979); Colo.Rev.Stat. § 19-1-106(a)(b)(ii) (1973); D.C. Code Ann. § 16-2304(b) (Supp. V 1978); Ill.Ann. Stat. ch. 37, § 701-20(1) (Smith-Hurd Cum.Supp. 1979); Iowa Code Ann. § 232.89.1 (West Cum.Supp. 1979); Me.Rev.Stat.Ann. tit. 22, § 4005.2 (Supp. 1979); Md.Cts. & Jud.Proc. Code Ann. § 3-821 (1980); Mass.Ann.Laws ch. 119, § 29 (Michie/Law Co-op Cum.Supp. 1980); Minn. Stat.Ann. § 260.155(2) (West 1971); Neb. Rev.Stat. § 43-205.06 (1943); N.M.Stat. Ann. § 32-1-27 F (1978); N.Y.Jud.Fam.Ct. Act § 262(a) (McKinney 1975 & Supp. 1979); N.D.Cent.Code § 27-20-26 91974); Ohio Rev.Code Ann. § 2151.352 (Page 1976); Okl.Stat.Ann.titl. 10, § 1109(b) (West Cum.Supp. 1979); Ore.Rev.Stat. § 419.498(2) (1977); S.D. Codified Laws Ann. § 26-8-22.2 (1976); Va.Code § 16-1-266(C)(2) (Cum.Supp. 1980); Wis.Stat.Ann. § 48.23 (West 1979). The same position is taken in the Uniform Juvenile Court Act § 26(a), and by the IJA-ABA Joint Commission on Juvenile Justice Standards, Standards Relating to Counsel for Private Parties § 2.3(b) (1976).

purely private parties litigate the issue of child custody. Today's holding applies only when the state actively interferes with the integrity of the family, not when it adjudicates the competing claims of private parties. See Rowell v. Oesterle, 626 F.2d 437 (5th Cir. 1980).

The relief we affirm is declaratory and renders null and void the state decree determining Carl Davis to be a dependent child. We believe that injunctive relief is inappropriate since there is no indication that the judges of the State of Florida will not conform to the dictates of the Constitution. We therefore vacate the injunction entered by the district court. Since appellant has conceded that attorneys' fees are inappropriate in this case, we also reverse the

district court on this issue.

AFFIRMED IN PART, VACATED and REVERSED IN PART.

Chief Judge JAMES P. COLEMAN and Circuit Judge CHARLES CLARK would have deferred decision pending the Supreme Court's decision in 79-6423, Lassiter v. Department of Social Services of Durham County, North Carolina.

JOHN R. BROWN, Circuit Judge, with whom COLEMAN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, GARZA, HENDERSON and REAVLEY, Circuit Judges, join, dissenting:

What this case involves was succinctly described in my panel dissenting opinion (with partial concurrence):[1]

[1] Further reflection and study convince me that my concurrence in part in the panel opinion was a mistake since I believe the habeas corpus was not a permissible vehicle to reach the Court's due process decision.

> Once again this Court in the high name of the Constitution becomes involved by the majority in the most direct way in domestic problems wisely left to the states. Not only that, it is done by an order declaring unconstitutional prior decisions of the state's highest tribunal through the medium of an attack directed against an innocent local state trial circuit judges, all of whom--including all other judges high and low in the whole state of Florida--are now categorically directed, without discretion or consideration of real needs, to conform to our edict. I think all of the principles of Federalism and the demands of comity are defeated by this action and I therefore dissent from this intrusion.

Davis v. Page, 618 F.2d 374, 386 (5th Cir. 1980).

Domestic relations is an area of law in which Federal Courts traditionally have deferred to State Courts. Sosna v. State of Iowa, 419 U.S. 393 , 404, 95 S.Ct. 553, 559, 42 L.Ed.2d 532, 543

(1975); DeSylva v. Ballentine, 351 U.S. 570, 580, 76 S.Ct. 974, 979, 100 L.Ed. 1415, 1427 (1956); Bell v. Bell, 411 F.Supp. 716 (W.D.Wash. 1976). Federal Courts have always preferred to abstain from answering questions of law, such as those contained in domestic relations suits, which the states are by nature best equipped to deal with. See Moore v. Sims, 442 U.S. 415, 429-30, 99 S.Ct. 2371, 2380, 2381, 60 L.Ed.2d 994, 1007 (1979); Harris County Commissioners Court v. Moore, 420 U.S. 77, 83-84, 95 S.Ct. 870, 874-75, 43 L.Ed.2d 32, 39 (1975); Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1942). Although I refrain from asserting that there are not instances in which it is appropriate for Federal Courts to intrude in domestic relations matters, I believe

that such intrusion should only take place with proper awareness of the roles of Federal and State Courts and then only rarely and in extreme situations.

I am first concerned by this Court's conclusion and its operative order the Federal habeas corpus relief is appropriate in this case. The origins of this case are somewhat curious. The original complaint was in two counts. One count was stated as a claim action for declaratory and injunctive relief presumably under 42 U.S.C.A. § 1983 against all of the judges of the Juvenile and Family Division of the Circuit Court of Dade County, Florida, none of whom was charged with having custody of the minor. In a separate count, Ms. Davis sought a writ of habeas corpus against the Secretary of the Florida Department of Health and

Rehabilitative Services and three subordiante officials of that Department.

What started out primarily as a class action against state judges has now been framed by this Court as an action based essentially on Federal habeas. Although the majority discusses the appropriateness of habeas relief in this case there is no discussion of the 42 U.S.C. § 1983 cause of action upon which jurisdiction under 28 U.S.C. § 1343(3) and (4) is presumably based.

Clearly, Federal habeas is an inappropriate avenue of relief as respects the action against the state judges named as defendants, and more particularly as the vehicle for the sweeping declaration binding on all Florida Judges. There is no suggestion that the judges themselves at the time the Federal suit was filed

had custody of Carl Davis.

I also believe that Federal habeas is an inappropriate avenue of relief as respects the action against the Florida Department of Health and Rehabilitative Services. My concerns are essentially the same as those expressed by the First Circuit in Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978), in which that Court concluded that Federal habeas relief was not available to assert the rights of the parent, not that of the child, in a case where, as here, a parent contested the involuntary termination of parental rights. It should be pointed out that in a recent unpublished opinion of the Third Circuit reached a conclusion on this same question contrary to that of the First Circuit. However, that opinion was

issued over a sharp dissent. Subsequently, the case was put en banc and has recently been reargued en banc. Lehman v. Lycoming County Children's Services Agency, (No. 79-2466, 3d Cir. July 23, 1980, reargued en banc November 17, 1980).

My concern with the assumption of Federal habeas in this case is not merely a matter of jurisdiction quibbling. As recognized by the Court in Sylvander:

> Federal habeas when applied to persons under state control is a procedure of unique potency within the Federal-state framework, having far different and more far-reaching consequences than a state's utilization of habeas within its own system.

584 F.2d at 1111. Unlike other avenues of relief, under Federal habeas a Federal District Court can assume jurisdiction of a case regardless of prior state proceed-

ings--res judicata and collateral estoppel are no bar. This Court's decision today represents the first recognition by this Circuit of the availability of Federal habeas relief in a state child custody dispute. Furthermore, the Supreme Court has never explicitly recognized the appropriateness of Federal habeas in a case such as this.[2] The

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[2] I agree with the First Circuit that:

> [T]he fact remains that over the many years since enactment of the habeas corpus statute in 1867, the Supreme Court has never acknowledged that habeas corpus is an appropriate remedy for litigating federal constitutional claims arising from state child custody disputes. In two child custody cases decided on federal question grounds (but arguably having jurisdictional connotations) the Court refused to authorize the writ. Matters v. Ryan, 249 U.S. 375, 39 S.Ct. 315, 63 L.Ed. 654 (1919); In re Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890). None of the cases implicating custody rights that have come before the Court reached

expansion of Federal habeas in this manner is not a course which this Circuit should enter into lightly.

From a strictly legal standpoint, I disagree seriously as to the appropriateness of Federal habeas relief in this case. The "custody" of Carl Davis which purportedly gave rise to Federal habeas in this case was not the type of "custody" which has traditionally formed

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the Court through the route of federal habeas. The Supreme Court's sweeping language in cases such as Hensley v. Municipal Court, supra, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 141 (1973) and Jones v. Cunningham, supra, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), concerned extensions of the writ to persons criminally accused who had obvious claim to be treated for federal jurisdictional purposes in the same manner as their incarcerated brethren, even if not confined in the strict sense.

584 F.2d 1103, 1110.

the basis for habeas relief.[3] Even a cursory review of the Court's opinion reveals that the primary interest being addressed is the interest of Ms. Davis as the parent in not being deprivied of her child. Only by a strained reading of the opinion can it be said that

> such as Hensley v. Municipal Court, supra, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 141 (1973) and Jones v. Cunningham, supra, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), concerned extensions of the writ to persons criminally accused who had obvious claim to be treated for federal jurisdictional purposes in the same manner as their incarcerated brethren, even if not confined in the strict sense.

584 F.2d 1103, 1110.

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[3] For the reasons pointed out in Note 1, supra, I recant the suggestion in may panel concurring/dissenting opinion that since Ms. Davis was seeking the release from custody of her son, Federal habeas was available to her. 618 F.2d at 388.

the true interest with which the Court is concerned is the interest of Carl Davis in not being deprived of his liberty by virtue of some unconstitutional order.

From the standpoint of the administration of justice and the maintenance of our cherished principles of federalism. I am acutely disturbed by the recognition of Federal habeas as an available avenue of relief in child custody disputes. First, I am not convinced that the interests of family and child will be significantly fostered by permitting actions such as these to be litigated in two sets of courts--first state and then federal, or worse, perhaps simultaneously. Furthermore, I suspect that it will be difficult for our courts to place limits on the types of child custody cases which may be brought in Federal Courts through

the habeas route. Although the Court in this case takes pains to emphasize that its holding does not extend to cases in which "two purely private parties litigate the issue of child custody" custody disputes is essentially the same as that in the present controversy--a parent is deprived of the continuing custody of his or her child through a state decree. Under the rationale of the Court's decision, what real bar would there be, for example, to an indigent mother asserting a constitutional right to counsel in a "purely private" custody battle, in which she faces the real possibility of being deprived of the custody of her child, and then litigating that question through both the State and Federal Courts? The disclaimers of the majority opinion not withstanding, I fear that this opinion

will privide an open invitation for a great, and growing, number of disappointed parents in so-called "private" custody suits to seek habeas relief in Federal Court.

Even more basic, I do not think the problems can go away by characterizing these battles as "private litigation". The State has very much an immediate and direct interest in the welfare of a child and hence his or her custody. So too, does the State have a significant interest in the marriage relationship and the maintenance of the family and the home.

Once this is recognized where does the Court's intrusion end? Consider for example, a husband who has secreted all of his property and files a divorce suit against his wife who desperately wants to preserve both marriage and home and

protect it, (and incidentally her errant husband from the wiles of another) but who is left penniless and unable to obtain counsel. Would this Court, again in the high name of the Constitution, decree that the State must provide counsel at its expense? Or suppose that the custody controversy arises directly out of the divorce action as to which the wife, now a forced indigent, is indifferent, but is nevertheless locked in a struggle over parental custody of a minor son. Again does the Constitution mandate counsel for her at state expense.

While the question should not have been reached, I also am compelled to disagree with the Constitutional issue as presented to and decided by the Court. In this case, this Court imposes on the state legal system a hard and fast rule.

They tell the Florida Circuit Judges that they are not capable of deciding when an indigent parent present at a dependency hearing is in need of counsel, and worse, we declare that the Supreme Court of Florida's rule is unconstitutional for all time and for all circumstances. The state judges have no choice but to appoint counsel in every case.

Although Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1941) was overruled by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), I do not think that the notion of deference to state courts in the interpretation of their own laws, expressed in Betts, 316 U.S. at 472, 62 S.Ct. at 1261, 86 L.Ed.2d at 1607, has ever been dismissed as no longer important. In Gideon, the Supreme Court decided, not

that comity was an insignificant concern for Federal Courts, but that it was outweighed by a more powerful Federal concern in that case, the fundamental right to counsel in a state criminal prosecution, guaranteed by the Sixth Amendment through the Fourteenth Amendment.

I cannot agree with the Court's conclusion that the Florida Supreme Court's case-by-case approach to the provision of counsel in dependency proceedings, as enunciated in Potvin v. Keller, 313 So.2d 702 (Fla. 1975), is constitutionally unsound. The rule adopted in Potvin was taken directly from the Ninth Circuit opinion in Cleaver v. Wilcox, 499 F.2d 940 (1974) and reasonably assures that harsh results will be avoided in dependency proceedings. Furthermore, the Florida Supreme Court has even more

required the appointment of counsel in all cases where indigent parents are threatened with permanent loss of custody or when criminal charges may arise from the proceeding. It is only in cases which contemplate less serious consequences that the case-by-case approach comes into play. In the Interest of D.B. & D.S., 385 So.2d 83 (Fla. 1980).

Every case on which the Court today relies in support of its holding of an absolute right to counsel for parents in a child dependency proceeding, is a criminal case involving the Sixth Amendment, or at least a case involving the potential confinement of the person to whom the absolute right to counsel is granted.[4] I cannot disagree that the

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[4] With respect to instances in which habeas has been granted, the First

Circuit correctly points out:

> Finally, the writ has been issued in several child custody cases decided by federal courts, albeit in special and largely distinguishable circumstances. Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975); United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974), cert. denied, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975); Application of Reed, 447 F.2d 814 (3d Cir. 1971). See also Bell v. Leonard, 102 U.S.App.D.C. 1979, 251 F.2d 890 (1958); Young v. Minton, 344 F.Supp. 423 (W.D.Ky.1972); United States ex rel. Schneider v. Sauvage, 91 F. 490 (W.D.Pa. 1899). But see United States ex rel. Reed v. Tinder, No. 75-1454 (D.W.Va. 1975) (unpublished opinion).[11]
>
> [11] The children in Nguyen Da Yen were in federal custody since they were under the supervisory control of the Immigration and Naturalization Service, having been brought to this country during the so-called "Vietnamese Babylift." See 28 U.S.C. § 2241(c)(1). Application of Reed, Young, and Bell involved child custody disputes arising in the Virgin Islands and in the District of Columbia, where the federal courts were acting as territorial courts.

right of a parent to retain custody of his children is an important right. But it is not of the constitutional dimension as is an individual's right to his own liberty. It is not an interest which can outweigh the concerns of federalism and and of state and federal comity. Therefore, I cannot agree with the holding

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Cobell was based on special grant of jurisdiction over claims relating to federal Indian reservations, 25 U.S.C. § 1301, and concerned an Indian child. In Schneider, the court denied the writ. It pursued the habeas question at some length only because the couple on whose behalf the vice-counsul of Belgium had brought the petition were citizens of Belgium and the child had been born in Belgium. In Tinder, a district court did rely on habeas corpus conditionally to require the State Department of Welfare to return a child to its mother, unless the State granted the mother a hearing before entering its final judgment. The opinion was unreported, however, and did not discuss the jurisdictional issue in detail.

584 F.2d 1103, 1110.

of the Court--that an indigent parent has an absolute constitutional right to an attorney in a juvenile dependency proceeding to assert and protect that parent's right to continue to raise, care for, nurture and teach a minor child.

I therefore, respectfully dissent.

Hilary DAVIS et al., Plaintiffs,

v.

William J. PAGE, Jr., et al., Defendants.

United States District Court,
S.D. Florida.

Nov. 23, 1977.

Indigent parent brought class action seeking declaratory relief declaring unconstitutional the conducting of child dependency proceedings in Florida against indigent parents without providing them counsel at state's expense and seeking to enjoin dependency hearing without providing counsel to indigent parents. In a separate count, indigent parent sought writ of habeas corpus to secure the release of her child from continuing supervision by Florida Department of Health and Rehabilitative Services. On

plaintiff's motion for summary judgment, the District Court, Aronovitz, J., held that: (1) due process and equal protection clauses of Federal Constitution required that parents in child dependency proceedings be advised of their right to assistance of counsel and, if indigent, that counsel be appointed for parents unless they knowingly and intelligently waived the right and (2) counsel had to be made available immediately following service of petition on parent or seizure of child and had to be made available if preliminary seizure hearing was held prior to adjudicatory hearing.

Motion granted.

1. Infants K.16.8

In a child dependency adjudicatory hearing in Florida, state must prove its

case by preponderance of evidence. West's F.S.A. §§ 39.01 et seq., 39.01(10), 39.05(4), 39.09(1)(b).

2. Infants K.16.8

Rules of evidence generally applicable to civil proceedings apply to child dependency adjudicatory hearings in Florida. West's F.S.A. § 39.01 et seq.

3. Infants K.16.8

Although traditional rules of evidence govern child dependency adjudicatory hearings in Florida, virtually no evidentiary rules limit receipt of evidence at subsequent state proceedings which are characterized as disposition hearings. West's F.S.A. § 39.01 et seq.

4. Infants K.16.8

Although state of Florida bears burden of proof in a child dependency adjudicatory hearing, parent bears burden

of proof in subsequent disposition hearing and must prove that restoration of custody is in best interest of child. West's F.S.A. § 39.01 et seq.

5. Constitutional Law K.251

Due process safeguards which must attent interruption of a constitutionally protected right vary with nature of state proceeding and nature of right at issue.

6. Constitutional Law K.274(2)

Right to integrity of the family is among the most fundamental rights under the Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

7. Constitutional Law 255(4)

Due process clause of Fourteenth Amendment requires that parents in child dependency proceedings be advised of their right to assistance of counsel and, if indigent, that counsel be appointed

unless they knowingly and intelligently waive their right to counsel.

U.S.C.A.Const. Amend. 14.8.

Constitutional Law K. 242.1(4)

Equal protection clause requires provision of counsel to indigent parents in a child dependency proceeding

U.S.C.A.Const. Amend. 14.

9. Infants K.16.5

Unlike probation revocation hearings and prison disciplinary hearings, child dependency hearings are judicial proceedings which are procedurally analogous to criminal trials.

10. Infants K.16.9

In that Florida statute provides that temporary commitment of child to custody of state can last until child reaches age of 18 years, it is inherent in every child dependency proceeding that there is

a substantial possibility of prolonged separation; accordingly, counsel must be provided tc all indigent parents in childdependency proceedings and not on a case to case basis. West's F.S.A. § 39.11(1)(c).

11. Infants K.16.9

Implicit in right to counsel at child dependency hearing is right to notice that counsel will be provided without expense to parents who are indigent.

12. Infants K.16.9

Although parents' right to counsel in child dependency proceeding may be waived, no waiver will be effective prior to notice that counsel will be provided if parents are indigent.

13. Infants K.16.9

Recognizing presumption against waiver of constitutional rights, a trial judge

in a child dependency proceeding must determine whether parents' purported waiver of right to counsel is knowing and intelligent.

14. Infants K.16.9

Critical stages analysis used in criminal proceeding governs timing of right to counsel in child dependency proceeding.

15. Infants K.16.9

With respect to child dependency adjudicatory hearing, counsel must be made available to indigent parents immediately following service of petition upon parents or seizure of child and, if preliminary seizure hearing is held prior to adjudicatory hearing, counsel must be made available at that hearing. West's F.S.A. § 39.05, 39.06.

16. Civil Rights K.13.17

Parent who brought successful class action declaring unconstitutional practice in Florida of conducting childdependency proceedings without providing counsel to indigent parents at state's expense was entitled to recover reasonable attorney fee pursuant to Civil Rights Attorney's fees Awards Act. 42 U.S.C.A. § 1988.

Michael R. Masinter, Delray Beach, Fla., Stephen W. Bricker, Richmond, Va., for plaintiffs.

Thomas A. Beenck, Tallahassee, Fla., Chester G. Senf, Jacksonville, Fla., J. Robert Olian, Homestead, Fla., for defendants.

MEMORANDUM OPINION

ARONOVITZ, District Judge

In this class action, Plaintiff seeks

declaratory relief holding and declaring unconstitutional the conducting of child dependency proceedings against indigent parents in the Juvenile Court Division of the Circuit Court, Dade County, Florida without providing them counsel at the state's expense.

Plaintiff, Hilary Davis, represents a class composed of all indigent parents who have been or may be defendants in child dependency and neglect proceedings in Juvenile and Family Division of the Circuit Court of Dade County, Florida, without being advised of their rights to counsel or afforded the right to counsel at state's expense, if indigent. Defendants are the Judges of the Juvenile and Family Division of the Dade County Circuit Court acting in their official capacity and thus as and for the State of

Florida. Plaintiff further seeks to enjoin dependency hearings without providing counsel to indigent parents.

In a separate count, Plaintiff seeks a writ of habeas corpus to secure the release of her child from the continuing supervision by the Florida Department of Health and Rehabilitative Services under the continuing jurisdiction of the Dade County Circuit Court.[1] The defendants

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[1] Plaintiff originally sought restoration of custody. However, during the course of these proceedings, custody was restored to her subject to supervision by the state and the continuing jurisdiction of the Circuit Court. The plaintiff's child is still "in custody". See Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). See also Carafas v. LaVelle, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973).

in the habeas count are the Secretary of said Department and three subordinate officials of the Department of Health and Rehabilitative Services.

This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. Sec. 2241 et seq., and 28 U.S.C. Sec. 1343(3) and (4).

At an earlier hearing, this Court certified this case as a class action under Fed.R.Civ.P. 23(b)(2). The case is before the Court on Plaintiff's Motion for Summary Judgment. Since there are no material facts in dispute, summary judgment is appropriate.

FACTUAL BACKGROUND

On January 30, 1976, Hilary Davis, the mother of Carl Thor Davis, left her husband because he beat her 14-month old baby until he broke the baby's arm.

After spending the night in the hospital with her son, Hilary Curtis Davis turned to the state for help. The state, which operates public assistance programs esigned to help abandoned families,[2] responded on February 4, 1976 by initiating a dependency proceeding under F.S. Sec. 39.01 et seq. to remove Carl Thor Davis from the custody of his mother.

An initial hearing took place later during the day of February 4, 1976 in the Juvenile and Family Division of the Dade County Circuit Court before a Circuit

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[2] The state participates in the jointly funded federal-state program of Aid to Families With Dependent Children (AFDC), 42 U.S.C. Sec. 601 et seq. Because the plaintiff and her child had no income, and was separated from her husband, they would have qualified for financial assistance and medical care under the AFDC program.

Court Judge during which the state sought an order directing the hospital to release Carl Thor Davis to the Florida Department of Health and Rehabilitative Services. Hilary Davis attended the hearing without counsel. The Court granted custody of Carl Thor Davis to the state pending a formal adjudicatory hearing scheduled for March 4, 1976. According to the record the Judge did not offer to appoint counsel to represent Hilary Davis during the hearing on February 4, but advised her to have counsel at the adjudicatory hearing.

Because she was indigent, Hilary Davis was unable to retain private counsel to represent her at the March 4 adjudicatory hearing. Recognizing her need for legal assistance, she repeatedly attempted to secure the services of an attorney

employed by Legal Services of Greater Miami, Inc. However, she was unable to secure representation, and she appeared at the dependency adjudicatory hearing without counsel.

[1,2] Dependency adjudicatory hearings proceed pursuant to Fla.Stat. Sec. 39.09(1)(b). The state must prove its case by a preponderance of the evidence, and the rules of evidence generally applicable to civil proceedings apply.[3] While the state is represented by counsel,[4] nothing in the statutory framework authorizes or requires the appointment of counsel to represent

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[3] Fla.Stat. Sec. 39.01(10) provides alternative grounds for a finding of dependency. The constitutionality of those provisions is not before the Court in this proceeding.

[4] Fla.Stat. Sec 39.05(4) provides that the State Attorney shall represent the state in contested proceedings.

indigent parents.[5] Dependency adjudicatory hearings should not be held without advising parents of their right to counsel and without appointing counsel for those parents who are indigent.

Without benefit of counsel, Hilary Davis was little more than a spectator in the adjudicatory proceeding. She was ignorant of the law of evidence, and of the substantive law governing dependency proceedings. She sat silently through most of the hearing, and fearful of antagonizing the social workers, reluctantly consented to what she believed would be the placement of her child with the state for a few weeks.

The Juvenile Division Court conducted the adjudicatory hearing. According to

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[5] Fla.Stat. 39.09(1)(a) authorizes a continuance upon request of a parent who wishes to attempt to retain counsel.

the transcript Hilary Davis was not asked if she wished to be represented by cxunsel, and at no time did the Court offer to appoint counsel to represent her[6] since there is no statutory authority in Florida for payment of such attorneys' fees. Rather, Carl Thor Davis was adjudicated dependent, commited to temporary custody of the Department of Health and Rehabilitative Services pursuant to Fla.Stat. Sec. 39.10(4) and Sec. 39.11(1)(c). At the conclusion of the hearing, the Court told Hilary Davis to contact a lawyer. She was not advised of her right under Fla.Stat. Sec. 39.14(1) to appeal from the adjudication of

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[6] The transcript of the dependency hearing reflects that she had attempted without success to obtain the services of an attorney.

legal consequences.[7] Fla.Stat. Sec 39.11(1)(c) specified that temporary custody "shall continue until terminated by the court or until the child reaches the age of 18." Thus, the "temporary" custody which Plaintiff believed would last a few weeks to enable her to find a job can potentially last for another 16 years. Subsequent state proceedings are categorized as disposition hearings rather than adjudicatory hearings, while traditional rules of evidence govern adjudicatory hearings, virtually no evidentiary rules limit the receipt of evidence at disposition hearings.[8]

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[7] The resulting long term damage to the parent-child relationship is described in the affidavits of Sally A. Provence, M.D., Albert J. Solnit, M. D., and Andre P. Derdeyn, M. D.

[8] Compare Fla.Stat. Sec 39.09(1)(b) with Fla.Stat. Sec 39.09(3).

While the state bears the burden of proof in an adjudicatory hearing, the parent bears the burden of proof in a disposition hearing and must prove that restoration of custody is in the best interests of the child.[9]

The consequences of an adjudication of dependency are aptly illustrated by the instant case. Plaintiffs child was removed because her former husband beat him on January 30, 1976. On January 30, 1976, Plaintiff left her husband. On March 4, 1976, the Circuit Court

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9 Compare Fla.Stat. Sec. 39.09(1)(b) and Fla.Stat. Sec. 39.01(10) with Fla.Stat. Sec. 39.09(3) and Fla.Stat. SEc 39.11(1)(a)-(d). Pendarvis v. State, 104 So.2d 651 (Fla.App. 1958) held that evidence inadequate to support a finding of dependency nevertheless may be adequate to support a refusal to restore custody, even when the parents demonstrate their fitness, ability, and willingness to properly rear their child.

finally adjudicated Plaintiff's child dependent. Plaintiff later obtained counsel, securing a dissolution of her marriage. Through subsequent litigation in the state proceedings, she obtained weekend home visits with her son and on January 28, 1977, Plaintiff finally secured the return of her son, subject to continuing supervision and under the continuing jurisdiction of the Circuit Court. Thus, Plaintiff lost the custody of her son for a full year.

PROCEDURAL DUE PROCESS AND THE RIGHT TO COUNSEL

[5] The procedural safeguards which must attend interruption of a constitutionally protected right vary with the nature of the right at issue. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S.Ct. 1743,

6 L.Ed.2d 1230 (1961). In articulating the balancing test which determines what process is due, the Supreme Court has stated that "the extent to which procedural due process must be afforded . . . is influenced by the extent to which [an individual] may be 'condemned to suffer a grievous loss'." Goldberg v. Kelly, 397 U.S. 254,262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970). Thus, the initial inquiry must focus upon the interest which Plaintiff seeks to protect--the integrity of her family.

[6] The right to the integrity of the family is among the most fundamental rights under the Fourteenth Amendment. The Supreme Court first recognized that right in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922). In Meyer, the Court stated that the

"liberty" as set forth in the due process clause "denotes, not merely freedom from bodily restraint, but also the right . . . to marry, establish a home and bring up children." 262 U.S. at 399, 43 S.Ct. at 626. Accordingly, the Court struck down a statute forbidding the teaching of the German language to children. Relying on Meyer, the Court later held unconstitutional a statute requiring that children must attend only public schools in Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), reasoning that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing . . . of [their] children." 268 U.S. at 513, 45 S.Ct. at 573. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645

(1944), the Court stated:

> It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . and it is in recognition of this that (Meyer and Pierce) have respected the private realm of family life which the state cannot enter. 321 U.S. at 166, 64 S.Ct. at 442.

In May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953), the Court, in holding that a mother, in a custody battle with her husband over their minor child, was not permanently bound by a previous award of custody, stated that "(R)ights far more precious to appellant than property rights will be cut off . . .". 345 U.S. at 533, 73 S.Ct. at 843.

More recently, the Court held in Stanley v. Illinois, 405 U.S. 645,

92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), that a conclusive presumption of unfitness for unwed fathers violated the Fourteenth Amendment, ruling that unwed fathers, were entitled to notice and a hearing before termination of parental rights. In defining the right at stake, the Court held that "(t)he rights to conceive, and to raise one's children have been deemed 'essential' . . . 'basic civil rights of man' . . . " 405 U.S. at 651, 92 S.Ct. at 1212.[10] Because the right in question was fundamental, the examined the conclusive presumption at

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[10] The Court also held in Stanley that the right to the integrity of the family emanated from the Ninth Amendment. 405 U.S. at 651. See also Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Esenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

issue under its strictest standard,[11] and found it constitutionally defective.

Analyzing these cases, two courts have held recently that the right of family integrity is a fundamental right under the Fourteenth Amendment. Roe v. Conn, 417 F.Supp. 769 (M.D.Ala.1976) (3 Judge Ct.); Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10 (S.D.Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976). The rationale of those cases is persuasive, and the Court concludes that strict scrutiny of the dependency proceeding is appropriate.[12]

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[11] Compare Stanley v. Illinois, supra, with Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

[12] Strict scrutiny is particularly appropriate in light of the evidence of the serious impact that a dependency proceeding may have upon the development of the child and upon the parent-child relationship.

It is settled law that the Fourteenth Amendment requires the provision of counsel to indigent criminal defendants threatened with incarceration. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Court has held that individuals facing commitment as sex offenders are entitled to counsel since "commitment proceedings whether denominated civil or criminal are subject to the Equal Protection Clause . . . and to the Due Process Clause." Specht v. Patterson, 386 U.S. 605, 608, 87 S.Ct. 1209, 1211, 18 L.Ed.2d 326 (1967). Finally and most significantly, the Court has held that children must be provided counsel in civil proceedings to determine delinquency, reasoning that the litigant

"needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." In re Gault, 387 U.S. 1, 36, 87 S.Ct. 1428, 1448, 18 L.Ed.2d 527 (1967).

[7] The parent's interest in the custody and companionship of his child and the grievous nature of the loss which accompanies interference with that interest suffice to mandate the provision of counsel under a balance of interest test without further inquiry. However, when those interests are examined in light of the complexity of dependency proceedings, the right to counsel inevitably emerges as an element of procedural due process. The complex

body of substantive law and evidentiary rules, and the compendium of relevant sociological, psychological, and medical data are simply beyond the understanding of most parents. The great majority of courts to consider the question have held that due process requires the provision of counsel to indigent parents.[13]

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13 Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); Smith v. Edmiston, 431 F.Supp. 941 (W.D.Tenn.1977); United States ex rel. Reed v. Tinder, No. 75-0454 CH (S.D.W.Va.1975); Shappy v. Knight, 251 Ark. 943, 475 S.W.2d 704 (1972); In re Rodriguez, 34 Cal.App.3d 510, 110 Cal.Rptr. 56 (Ct.App.1973); Chambers v. District Court of Dubuque County, 261 Iowa 31, 152 N.W.2d 818 (1967); Danforth v. Maine, 303 A.2d 794 (1973); Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55 (1976); State v. Caha, 190 Neb. 347, 208 N.W.2d 259 (1973); Crist v. Division of Youth and Family Services, 128 N.J.Super. 402, 320 A.2d 203 (1974); In re B., 30 N.Y.2d 352, 334 N.Y.S.2d 133 (App.Div.1972); State v. Jamison, 251 Or. 114, 444 P.2d 15 (1968); In re R., 455 Pa.29, 312 A.2d 601 (Pa.1973); In re

For all the above reasons, the Court concludes that the due process clause of the Fourteenth Amendment to the United States Constitution requires that parents in dependency proceedings be advised of their right to assistance of counsel, and if indigent, that counsel be appointed unless they knowingly and intelligently waive their right to counsel.

Myricks, 85 Wash.2d 252, 533 P.2d 841 (1975); State ex rel. Lemaster v. Oakley, 203 S.E.2d 140 (W.Va.1974). But see Potvin v. Keller, 313 So.2d 70;3 (Fla. 1975).

Recognizing the constitutional requirement, several states have also enacted statutes providing for counsel. See, e.g., Ariz.Rev.Stats. Ann. 8-225A; Cal.Civ.Code Sec. 237.5; 1971 Perm.Supp., Colo.Rev.Stats. Sec. 19-1-106; Conn.Gen.Stats. Title 17, Ch. 301, Sec. 17-66b; Ga.Code Ann. 24-2418.1; Idaho Code Sec. 16-2009; Kan.Stats.Ann. Sec 38-830; Minn.Stats. 266-155; N.D.Cent.Code Sec 27-20-26; Ohio Rev.Code Sec. 2151.351; and Okl.Stats. Title 10, Sec 1109(b).

EQUAL PROTECTION AND THE RIGHT TO COUNSEL

In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1952), the Supreme Court held that Equal Protection Clause of the Fourteenth Amendment requires the provision of free transcripts to indigent criminal defendants on appeal. The Court stated that when a state grants appellate review of convictions, it cannot do so

> "in a way that discriminates against some convicted defendants on account of their poverty . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 19, 76 S.Ct. at 590.

Expanding upon that rationale, the Court held in Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1956) that the equal protection clause requires the provision of counsel to

indigent criminal defendants in appeals provided of right. More recently, in Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), the Court held that an indigent criminal defendant convicted of a misdemeanor for which no jail sentence was imposed was entitled to a free transcript in order to pursue an appeal. Rejecting the city's argument that in the absence of a jail sentence, the equal protection clause was inapplicable, the Court held the right to a transcript turned upon the impact of the state's action.

Griffin, Douglas, and Mayer suggest that when the state undertakes to deprive an indigent individual of a fundamental interest or to impose upon him a significant stigma through a formal judicial proceeding, it must provide that individ-

ual with the same tools which a financially able individual can obtain to appeal from that action. Thus, counsel and transcripts must be provided on appeal. The extent to which the equal protection caluse requires the provision of those tools turns upon the consequences of the state's action rather than the label attached to it. Mayer v. City of Chicago, supra.

Parents in dependency proceedings are more likely to retain custody of their children if represented by counsel.[14] Thus, different results are obtained when counsel is present.

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[14] Affidavit of A. Lester Langer. See also Representation in Child-Neglect Cases: Are Parents Neglected? 4 Col.J. of Law & Social Problems 230, 241 (1968)

[8] While a dependency proceeding is not a criminal proceeding, it is substantially similar. The state is the initiating party, the proceeding is formal, and the potential loss is quite substantial. Since the state is threatening the deprivation of a fundamental interest, it must provide counsel to indigent parents unless it can demonstrate a compelling state interest in not providing counsel. Since the state has "no" compelling interest in not providing counsel, the equal protection clause of the Fourteenth Amendment requires the provision of counsel to indigent parents in dependency proceedings.

THE SCOPE OF RELIEF

With the exception of Cleaver v. Wilcox, supra, cases requiring the

appointment of counsel in dependency proceedings have mandated the provision of counsel to all indigent parents.[15] By contrast, Cleaver v. Wilcox required a case by case evaluation of the circumstances giving rise to the proceedings. In so ruling, the Ninth Circuit adopted the now discredited practice endorsed in Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).[16] Betts led to confusion and a plethora of litigation, and the case by case approach to the right to counsel finally proved unworkable. Thus, in Gideon v. Wainwright, supra, the Court

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[15] See n. 13, supra. See also Roe v. Conn., supra, at 780.

[16] The California legislature enacted law mandating appointment of counsel that same year. Cal.Civ. Code Sec. 237.5 Florida has no analogous legislation.

overruled Betts, requiring the provision of counsel to all indigent felony defendants. Applying the same rationale, the Court imposed an absolute right to counsel in juvenile delinquency proceedings. In re Gault, supra, and sex offender proceedings, Specht v. Patterson, supra.

[9] The decision in Cleaver v. Wilcox, supra failed to give proper consideration to the complexity of dependency hearings. Unlike probation revocation hearings[17] and prison disciplinary hearings,[18] dependency hearings are judicial proceedings. They are quite formal, conducted under judicial rules of

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17 Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1972)

18 Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

evidence. The state is represented by an attorney, and the entire proceeding is conducted as a traditional adversary trial. Dependency proceedings bear no resemblance to informal administrative hearings; rather they are procedurally analogous to criminal trials. Accordingly, Gideon, Argersinger, Gault, and Specht counsel the application of an absolute rule.

[10] Avoiding the case by case approach, United States ex rel. Reed v. Tinder, No. 75-0454 (S.D.W.Va.1975) and Smith v. Edmiston, supra, held that due process requires the provision of counsel to indigent parents in cases which involve the substantial possibility of either prolonged separation or termination of parental rights. Following the same reasoning, Roe v. Conn.,

417 F.Supp. 769 (M.D.Ala.1976) (3 Judge Ct.) held that due process requires the appointment of counsel in dependency and neglect proceedings to all children whose parents are indigent. 417 F.Supp. at 780.[19] Inasmuch as Fla.Stat. Sec. 39.11(1)(c) provides that a temporary commitment of a child to the custody of the state can last until the child reaches the age of 18, it follows that inherent in every dependency proceeding is the substantial possibility of prolonged separation. Accordingly, counsel must be provided to all indigent

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[19] The question of whether the Court should provide for appointment of independent counsel to represent the child in dependency proceedings is not before this Court.

parents in dependency proceedings.[20]

[11-13] Implicit in the right to counsel is the right to notice that counsel will be provided without expense to those parents who are indigent. While that right may be waived, no waiver will be effective prior to notice, since "the defendant who does not ask for counsel is the very defendant who most needs counsel." Miranda v. Arizona, 384 U.S. 436, 471, 86 S.Ct. 1602, 1626, 16 L.Ed.2d 694 (1964). Recognizing the presumption

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[20] In providing counsel to indigent parents, the courts are free to appoint the Public Defender or private counsel. Should the courts elect the latter alternative, they may appoint attorneys associated with a program funded under the Legal Services Corporation Act. 42 U.S.C. Sec. 2996, only if the appointment is "pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction." 45 C.F.R. Sec. 1609.4(c), 41 Fed.Reg. 38505 (Sept. 10, 1976).

against a waiver of a constitutional right, a trial judge in a dependency proceeding must determine whether a purported waiver of the right to counsel is "knowing and intelligent." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); see Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

[14] It is settled law that the right to counsel extends to all "critical stages" of a criminal prosecution. Thus, counsel must be provided at an arraignment,[21] a pretrial lineup,[22] a

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[21] Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157 7 L.Ed.2d 114 (1961).

[22] United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

preliminary hearing,[23] and a custodial interrogation.[24] While criminal proceedings are not precisely analogous to dependency proceedings, the "critical stages" analysis appropriately governs the timing of the right to counsel in dependency proceedings.[25]

[15] Under Fla.Stat. Sec. 3905, a dependency proceeding commences with the filing of a petition. Fla.Stat. Sec. 3906 provides for the issuance and service of a summons and the petition upon the parent, and allows the ex

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[23] Colemen v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

[24] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[25] It must be noted that parental misconduct giving use to a dependency proceeding may also be subject to criminal sanctions. Child neglect is a criminal offense in Florida. Fla.Stat. Sec.827.07.

parte seizure of the child in certain circumstances. In order that counsel may prepare adequately for the adjudicatory hearing which follows within 30 days, counsel must be available immediately following service of the petition or seizure of the child. If a preliminary seizure hearing is held prior to the adjudicatory hearing, counsel must be available at that hearing.

[16] Final judgment shall enter in accordance herewith.[26]

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[26] Plaintiff is entitled to a reasonable attorney's fee pursuant to the Civil Rights Attorney's Fees Awards Act, P.L. No. 94-559, 42 U.S.C. Sec. 1988 as amended. Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 76-1068-CIV-SMA

HILARY DAVIS, et al.,

Plaintiff,

vs. FINAL JUDGMENT

WILLIAM J. PAGE, JR., et al.,

Defendant.
_____/

Pursuant to a Memorandum Opinion granting summary judgment in favor of the plaintiff, HILARY DAVIS, entered on November 23, 1977, it is —

ORDERED AND ADJUDGED that Final Judgment be, and the same is, hereby entered in favor of the plaintiff, HILARY DAVIS, and against the defendants, WILLIAM J. PAGE, JR., et al. Further, it is —

ORDERED AND ADJUDGED that the Court, having entered Final Judgment on behalf of the plaintiff, hereby awards a

reasonable attorney's fees in the amount of $4,000 no/100, and Court costs in the amount of THIRTY DOLLARS and EIGHTY CENTS ($30.80.)

DONE AND ORDERED at Miami, Florida this 23 day of November, 1977.

s/ Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

cc: Michael R. Masinter, Esq.
Stephen W. Bricker, Esq.
Thomas A. Beenck, Esq.
Chester Senf, Esq.
J. Robert Olian, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-1068-Civ-SMA

HILARY DAVIS, et al.,

Plaintiff,

vs.

WILLIAM J. PAGE, JR., et al.,

Defendants.
_____/

AMENDED FINAL JUDGMENT

PURSUANT TO a Memorandum Opinion granting Summary Judgment in favor of the Plaintiff, HILARY DAVIS, entered on November 23, 1977, and the Final Judgment entered of even date therewith, and pursuant to Federal Rules of Civil Procedure 65(d), the said Final Judgment is hereby modified and amended. Thereupon, it is:

ORDERED AND ADJUDGED as follows:

1. That the class affected herein is composed of all indigent parents

who have been or may be Defendants in child dependency and neglect proceedings in the Juvenile and Family Division of the Circuit Court of Dade County, Florida without being advised of their rights to counsel or afforded the right to Court appointed counsel;

2. That Plaintiff, HILARY DAVIS, and the Class described are entitled to notification of their right to Court appointed counsel immediately following service of a Dependency Petition or seizure of a child, and that Plaintiff HILARY DAVIS and the Class described are entitled to the assistance of Court appointed counsel immediately following service of a Dependency Petition or seizure of a child, unless the right to counsel is knowingly and intelligently waived;

3. That the defendants-judges, their successors in office, agents and employees, and all other persons in active concert and

participation with them are hereby ordered and directed to notify Plaintiff and the class described herein of their right to the assistance of Court-appointed counsel, and to appoint counsel to those members of the Class who do not knowingly and intelligently waive their right to counsel.

4. That the adjudication of dependency entered in Dade County Circuit Court against Plaintiffs, HILARY DAVIS and CARL THOR DAVIS, be and the same is hereby set aside and is declared to be null and void.

5. That judgment be and it is hereby entered in favor of Plaintiff and against the defendants-judges in their representative capacities (not individually nor personally) as Judges of the Juvenile and Family Division of the Circuit Court of Dade County, Florida, for a reasonable attorney's fee in the sum of $4,000.00 and Court costs in the amount of $30.80,

aggregating $4,030.80.

DONE AND ORDERED at Miami, Florida,

this 25 day of January, 1978.

s/ Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

cc: Michael R. Masinter, Esq.
Chester G. Senf, Esq.
Thomas A. Beenck, Esq.
Stephen W. Bricker, Esq.

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

JUVENILE DIVISION

IN THE INTEREST OF: *

CARL T. DAVIS, * NO. 76-413-A
*
Dependent. *
* * * * * * * * * * *

The above-entitled cause came on for hearing before the Honorable SEYMOUR GELBER, Judge of the above-styled court, on the 4th day of March, 1976, at 800 Northwest 28th Street, Miami, Florida, pursuant to Notice.

APPEARANCES:

GERALD JASKI, ESQUIRE
Appearing on behalf of
Protective Services.

ALSO PRESENT:

BETTIE NELSON,
Social & Economic Services Program.

DENNIS LARSON,
Abuse Team.

BETTY DIEHL,
Abuse Team.

KATHLEEN CONNOLLY,
Social & Economic Services Program.

PAUL WILSON
South Dade Health Clinic.

HILLARY DAVIS,
Mother of Dependent.

LINDA LILIGE,
Aunt of Dependent.

THEREUPON . . .

the following proceedings were had:

MS. NELSON: Your Honor, I am Bettie Nelson from Social and Economic Services Program. We are here in the interest of Carl Davis, case no. 76-413A, family number the same.

Present in the court is Carl's mother, Hillary Davis.

This is Mr. Dennis Larson from the Abuse Team (indicating).

This is Mrs. Davis' sister-in-law, Linda Lilige (indicating).

This is Kathy Connolly from Social Economic Services Program (indicating).

And, Mr. Paul Wilson crom the South Dade Health Clinic, the agency that recommended adjudication of dependence and custody.

MR. JASKI: My name is Gerald Jaski, 19 West Flagler, and I represent protective services in this matter.

I think the Court should be fully apprised of all the background information so---

THE COURT: Well, what are we here for?

MR. JASKI: Here on a petition for adjudication of dependency.

And, what I was going to mention is, as of yesterday, we were told that the mother was represented, or would be represented by an attorney.

THE COURT: And, what has happened?

MR. JASKI: It seems there apparently has been a breakdown in communication, but Miss Diehl can describe what arrangements, if any were made, and she is the worker with the Abuse Team who has been assigned to the mother.

MS. DIEHL: Ms. Davis was taken to Legal Services ---

THE COURT: I am sorry, go slower. I cannot hear ---

MS. DIEHL: Ms. Davis was taken to Legal Servives. I took her there myself.

And, she made arrangements to speak with Mr. Lambert. She was supposed to call him and give him certain information concerning herself and the case.

And, I do not know if she did or not. But, evidently, she told me she did not call him at the right time, and could not get in touch with him, and when she finally did get in touch with him he said he did not know anything about the case.

So, I called Mr. Lambert, and I spoke to him. And, he said he would take the case, and that he wanted Ms. Davis to contact him.

And, I related this to Ms. Davis, and she was supposed to contact him either by 5:00 o'clock or 8:00 o'clock, and Ms. Davis ---

THE COURT: When was she supposed to have contacted him?

MS. DIEHL: Yesterday. So, Ms. Davis said that she called, and the first time she could not get in touch with him. Then she spoke with him, and he said he had another case around this time.

I tried to get in contact with Legal Aid day before yesterday, but I was told it was too late for them to take the case.

THE COURT: What was the name of the other agency?

MS. DIEHL: Legal Services.

THE COURT: Are they not part of the same organization?

MS. DIEHL: One is from the Bar Association and the other one is a federal agency.

MR. JASKI: Your Honor, I think you also should be aware that I believe the mother has agreed to the allegations and there is a stipulation. And, the father has been served also by subpoena.

We can proffer at this time, if you wish.

THE COURT: Let me talk to the mother.

What is your position in all this? Do you want the Division of Family Services to have custody of your child at this time?

MS. DAVIS: Temporarily.

THE COURT: Where is the father?

MS. DAVIS: Well, he should be in Homestead where he is living in a hotel, you know. where we stayed. But, I don't live there.

THE COURT: Now, did you call a lawyer and did you have this conversation that has been related to the Court?

MS. DAVIS: I called him. The woman at the desk, the answering service, told me he was in with a client.

And, then I got the other girl that was handling it, took down my -- answered

another time, and she told me he had to go to court, you know.

THE COURT: Okay.

You say that you want them to have temporary custody. Well, what do you consider temporary custody, for how long and for what purpose?

MS. DAVIS: Well, I have to get a place for myself to live, and my son. And, I have to get a job, you know, so I can support him, you know.

THE COURT: All right.

I will hear the testimony at this time in regard to the adjudicatory hearing, and the respondent can contact legal counsel and decide what further action to take.

MR. JASKI: Okay.

THE COURT: So, I will hear some testimony.

MR. JASKI: Do you want to swear all the witness in, please?

(Thereupon, the witnesses were duly sworn by the Court.)

MR. JASKI: Our first witness is Mr. Paul Wilson, social worker affiliated with the South Dade Health Community Center.

THEREUPON . . .

PAUL WILSON

was called as a witness and, after having

been duly sworn, was examined and testified on his oath as follows:

EXAMINATION

BY MR. JASKI:

Q. Would you state your name and ---

A. I'm Paul Wilson. I am a social service worker, assigned to the emergency unit, South Dade Community Health Center.

Q. During your functioning as a social worker at that facility, did you come into contact with a child called Carl Davis?

A. Yes, I did.

Q. Would you describe under what circumstances?

A. The child was admitted to our emergency department, was seen by Doctor Martinez.

He was convinced that the story given to him around the fracture of the child's are was not feasible.

He called me in and asked me to instigate contact with Protective Services, and to also attempt to see what we could do.

Q. When was this, and what was the injury?

A. Fracture to the child's arm. I believe it was the right arm, in this area here (indicating).

This was in the latter part of January.

Q. About January 30th?

A. Sometime around there.

Q. Was any consultation done with any other physicians, that you know of?

A. Yes. I pulled the X-rays that were done on the child at that time, and took them to Doctor Jerome B. Lief who is the medical director of the center, and is a pediatrician, and asked him to examine the X-rays.

And, his opinion was that the fracture could not have occurred as the parents stated.

Q. What happened then with the child?

A. I came back into the emergency room, and approached the parents of the child, and asked them to state to me how the fracture had occurred.

At that time Mrs. Davis began to related a story to me, and Mr. Davis interrupted and said, "That's not true, I broke the child's arm."

He said he broke the child's arm when the child flipped away from him while he was attempting to change the diaper.

Q. What if anything happened after that?

A. I held a consultation with Doctor Martinez and the other doctors who were in the emergency room. It was determined for the protection and well-being of the child that we should call Protective Services and ask for a hold on the child.

Q. Did you establish any background on the mother or father? Was there any previous history affiliated with your particular facility?

A. Yes, they had been known to us. They were known to us prior to the birth of the child. They were seen by Judy Jones in our Social Service Department under the supervision of Gracie Miller, who was supervisor of the program at the time.

Q. What was the nature of those contacts, for what purpose.

A. The encounter at that time was around the financial needs. However, I observed Mr. Davis, and saw him as a person who was cross dressing, that is to say a transvestite.

Mentioned this to my supervisor, and asked if there was going to be any attempt for intervention in this -- what can be called phychosexual problems.

She at that time determined they would rather pursue the area of the financial problems, rather than becoming involved in the psychosexual problems.

Q. Do you know from your investigation whether the natural father, Mr. Davis, has ever been institutionalized?

A. I cannot ascertain that for certain. There is a question of whether he was hospitalized under another name, rather than under the name we have on our records.

Q. Did you reach an opinion as to the safety of the child with regard to his being returned home?

A. Yes.

Q. And, what is that opinion?

A. That opinion was that child would have been in great danger to return to home under the conditions that existed.

Q. Do you feel the same way now?

A. I do.

Q. Did you investigate all the background information as to the living facilities involved?

A. I have not been into the home, no, I have not.

Q. What other social workers do you know are involved?

A. Through our agency?

Q. Or any other agency?

A. Well, of course, there were workers from our social service unit that had been involved with the family earlier. They were known to Protective Services prior to this time, according to information that I received, that there was an investigation of a possible previous incident.

Q. Of a previous incident?

A. Yes.

Q. Do you know approximately when that may have ---

A. No, I don't know the exact date.

Q. Just that there was a possible previous incident?

A. Yes.

Q. Do you have any recommendations, as a social worker in your facility, with regard to specifically this child?

A. I feel that the child should be palced in the custody of Protective Services, Children Services. There should be an examination as to whether or not the parents are going to be able to deal with the case, and manage the case.

It is my opinion that so long as Mr. Davis is in the middle of an identity crisis, that he will not be able to deal with the issue of raising a child. He cannot cope with himself, therefore he cannot cope with the child.

MR. JASKI: I have no further questions.

THE COURT: Thank you, sir.

MR. JASKI: The next witness is Kathy Connolly, please.

THEREUPON . . .

KATHLEEN CONNOLLY

was called as a witness and, after having been duly sworn, was examined and testified on her oath as follows:

EXAMINATION

BY MR. JASKI:

Q. Would you state your name and position for the record, please?

A. Kathleen Connolly, from Social and Economic Services, Protective Services.

Q. During the court of your employment as a social wroker for Protective Services, would you describe how and what the circumstances were that you came into contact with Carol Fuller Davis?

A. We received a report of a possible abuse at Protective Services,

and I don't remember exactly what date that was. It was sometime early in '75.

And, I went out to the ome to investigate this report, and met with Mrs. Davis and the baby.

The report had stated that the child had received a blow to the head, that was caused during an argument with Mrs. Davis and her husband.

And, at the time I met with Mrs. Davis, she told me her husband was no longer at home, that he had been taken up to Jackson Memorial Institute for psychiatric hospitalization, and that she felt there was no further danger to her child, that she was taking adequate care of him. And, she was at that time.

And, our involvement continued. I continued visiting with her, seeing her, seeing the baby, seeing her care and treatment of the baby.

Then further as the case progressed, I received a report, telephone call from Jackson Memorial from the hospital, that Mr. Davis had left the hospital without their permission, and at that point I asked my supervisor permission to go to the Homestead area where Mrs. Davis was living in order to pick up the baby,

because we felt that the problem that Mr. Davis had had -- Mrs. Davis admitted to me Mr. Davis caused injury to the baby.

I felt it was necessary for the child's safety to attempt to pick the child up. But, at that time I could not contact Mrs. Davis or Carl, although -- so, our previous case was closed.

Q. Did your investigation reveal how these incidents occurred or ---

A. Mrs. Davis told me that an argument had ensued between she and her husband, during which the baby was thrown across the room by Mr. Davis. And, she was unable to protect him from this at the time.

Q. And, this was approximately early 1975?

A. I don't remember the exact date. I'm sure it's in Mrs. Nelson's records.

Q. Were any other incidents described to you by anyone else?

A. The landlord and landlady of the hotel where Mrs. Davis was residing told me that during their contacts with Mr. Davis, they had found him to be a violent and possibly and abusive type of person, and they were rather afraid

of him, themselves.

Q. Was an incident involving the baby being held under water ever described to you?

A. No, not at that time.

Q. When was the last time you were involved with this case?

A. As I told you, I don't remember the exact date.

Q. Approximately?

A. I think it was Frebruary or March of last year.

Q. And, at that time do you have a recollection of whether or not you formed an opinion as the safety of the child?

A. It was my feeling that there was possibly ----

Q. By feeling, do you mean a reasonable opinion?

A. Yes, I believe so. It was my professional opinion at that time that as long as the baby was in Mrs. Davis' care, she would need further agency follow-up as to the care of the child, but that the child was primarily safe.

But, it was also my professional feeling with Mr. Davis out of the hospital, that the child was no longer safe in that home.

Q. Hypothetically, if the father were not institutionalized, that is, being held against his will, involuntarily in a hospital -- in other words, if he was free to go, even if he were in a hospital or if he was out of any institution free to come and go, would you feel the same way, that the child would be in immediate danger if left in the care of the mother?

A. Yes, I would have great fears of Mrs. Davis' ability to protect her child from an incident.

MR. JASKI: Okay. I have no further questions.

I would now like to call Linda Lilige.

THEREUPON . . .

LINDA LILIGE

was called as a witness and, after having been duly sworn, was examined and testified on her oath as follows:

EXAMINATION

BY MR. JASKI:

Q. Would you describe, first of all, where you live, what is your address?

A. 28630 Southwest 143rd Court, Homestead.

Q. And, what is your relationship to either of the parties?

A. I'm David Davis' sister.

Q. Did you have an occasion to visit with either the child, Carl Fuller Davis, or the parents of the child during the last year?

A. Yes, I have seen them.

Q. Do you keep up a good basis family relationship with contacts from time to time?

A. No, we don't see them that often.

Q. I am sorry, I cannot hear you.

A. No. I don't see her very often, but I do see them.

Q. How about the child, do you come into contact with the child at all?

A. Yes, I have seen him several time.

Q. Would you describe what your opinion is as to the child?

A. Well, I feel he can be taken better care of. I don't think right now he is safe with either one of them.

Q. Why do you say that?

A. I just don't feel the -- I just don't feel they can take care of him right now, David especially.

He really needs help. He can't-- and, I don't think Hillary can protect herself against him, or the feelings she

may have for him, you know, and I just-- I feel that for right now he shouldn't be with them.

Q. Have you every baby-sat for the child?

A. Well, my other sister has, but I have been there while she has baby-sit for him.

Q. Would you describe the condition the child has been in when she was turned over by the mother?

A. Well, he wasn't very clean. And--well, other than that, he wasn't taken care of properly, clean, in other words.

Q. Those are kind of general words, and I know maybe it is difficult, but could you be a little more descriptive?

A. Well, he was dirty. I mean his clothes and himself.

Q. Would you conclude that he was just not properly taken care of ---

A. Yes.

Q. -- by the mother or by the mother and father?

A. By either one of them, yes.

Q. You heard testimony earlier about the father's potential transvestite personality?

A. Yeah.

Q. Have you found this to be the case, have you seen him in that ---

A. Yes. He is. I don't know--I don't exactly know what the words mean.

Q. Well, was he dressing like a woman?

A. Yes, there are time I have seen ---

Q. Does he look like a very stable person to you?

A. No.

Q. Have you ever heard of any incidents--any incidents related to you of potential child abuse on Carl Davis?

A. Yes, I did hear Hillary--Hillary told me that one time he dumped the baby under the water in the tub, and held him under there. And, I think that she received a black eye from that.

Q. You mean the mother did?

A. Yeah. I suppose she was trying to protect the baby, but he did hold the baby under.

I mean, I didn't see it. She told me this. But, I have seen him play rought with him--I mean rougher than a father should play.

Q. How about as to food, have you

any comment on that, or do you feel he is adequately fed?

A. He might now, but at one time I don't believe that he was properly fed right. I mean, he could have been fed better.

MR. JASKI: I really am not asking these questions to embarrass you, or to embarras your relationship with your sister-in-law. So, I have no further questions.

I would like to now call Ms. Diehl, Ms. Betty Diehl, please.

THEREUPON . . .

BETTY DIEHL

was called as a witness and, after having been duly sworn was examined and testified on her oath as follows:

EXAMINATION

BY MR. JASKI:

Q. Would you please state your name and occupation for the record?

A. Okay. My name is Betty Diehl, social worker with Protective Services.

Q. Ms. Diehl, have you had an occasion during the course of your occupation in social work to come into contact with the mother?

A. Yes, I have.

Q. Would you describe the

circumstances, please?

A. Well, I first went to see her at Mother Whites, which is a boarding home. And, she and another girl share a room there together.

And, when I first met her, she was anxious to talke to me, and whatever.

Q. What is the basis of your working with her, what is the purpose?

A. I'm part of a new child abuse project, and there are five of us in a team. And, each of us try to work with one member of the family, so we can possibly provide better services to the family.

Q. Have you formed an opinion as to whether you feel Mrs. Davis might be able to take care of or probably take care of the child adequately at this time?

A. Well, not at this time, because the place where she is living now they don't even allow children there. So, that is out.

As far as her having a child right now, she doesn't have a place to stay, except at the boarding hom, now.

She has a lot of needs. She has told me that she would like to get a job, get an apartment, and get her child back as soon as possible.

She appears--when she speaks to me, she is very dependent. She has a lot of needs that need to be met by others right now, and I don't think she can fulfill needs of her child.

When she is with the child, she really cares for the baby, but I don't really thing she can take care of the baby right now.

Q. On the other hand, do you feel with proper guidance and help she can adequately take care of this child at a future time?

A. Yes, I do.

MR. JASKI: I have no further questions.

THE COURT: Thank you.

MR. JASKI: The last witness is another worked from that same team.

THEREUPON . . .

DENNIS LARSON

was called as a witness and, after having been duly sworn, was examined and testified on his oath as follows:

EXAMINATION

BY MR. JASKI:

Q. Would you please state your and occupation for the record?

A. Dennis Larson, case worker

with Protective Services.

Q. You are assigned, are you not, Mr. Larson, to dealing with Mr. Davis Davis in relationship to this abuse case?

A. Yes.

Q. And, have you been dealing with him, and would you describe what the nature of those dealings have been?

A. Yes, I have met with him four times. And, the first time was -- it was reported by his sister that he was talking about not knowing what to do with himself, and that there was not much for him to live for since his wife and child were not around.

So, I saw the possibility of some self-destruction ideation.

So, went down and met with him the next day, and he indicated that he didn't know what was happening, that they had left, and that was all that he had heard. And, he had no information about where they were.

Q. So, you had essentially four contacts with him periodically over what, the last month is it?

A. Right.

Q. Did you reach an opinion, basically? Do you have an opinion as to whether or not the child ought to be returned to him. be

allowed to return to the family and be able to take care of the child?

A. Well, he doesn't seem able to take care of himself, and he may be possibly self-destructive and there is a possibility of destructive to others.

Q. Do you feel your agency is qualified, competent, to deal with his problems?

A. Well, in addition to the kind of problems that we can help with, he seems to have a -- perhaps what we call a borderline psychotic condition where he talks about walking about the streets in a daze. And, he also has talked about imaginary things, about cats and dogs eating people.

And, so, there is a pretty confused state.

Q. So, is it your opinion that he reasonably speaking cannot take care of the child at this time?

A. Yes.

Q. Is not capable of doing it?

A. (Witness nods head.)

Q. Would you be recommending also a referral for further psychiatric evaluation and further treatment?

A. I have been recommending to

him he contact Mental Health. And, he has not.

So, it may be necessary for me to try to take him in, although Mental Health does not work in that way.

But, they would not possibly see him unless he was willing to be seen.

MR. JASKI: I have no further questions, Your Honor.

THE COURT: Thank you.

MR. JASKI: Your Honor, we have no further testimony to offer at this time.

THE COURT: Is there anything you would like to say at this time, Mrs. Davis?

MS. DAVIS: (Shakes head.)

THE COURT: I am going to adjudicate this child dependent, place the child in the temporary custody of the SES.

I want you to contact that lawyer that you spoke to, tell him what happened, and advise him that he can -- well, tell him to get in touch with Mr. Jaski, and he will fill him in as to what has happened, and he can then take whatever action he deems appropriate in your best interest.

MR. JASKI: Your Honor, I have another report (indicating).

THE COURT: Okay.

MR. JASKI: Thank you, Judge.

(Thereupon, the proceedings were concluded.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DADE)

I, GARY NED SMITH, a Certified Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I recorded the foregoing proceedings before the Honorable Seymour Gelber, Judge of the above-styled court, that the foregoing pages numbers 1 through 29, inclusive, constitute a true and correct transcription of my stenographic report of the proceedings of said hearing.

WITNESS MY HAND AND SEAL in the City of Miami, Dade County, Florida, this 19th day of May, 1976.

s/ Gary Ned Smith

Notary Public, State of Florida at Large
My Commission Expires Aug. 17, 1976, Bonded thru General Insurance Underwriters.

28 §2254. State custody: remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State, of that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the mearning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) the the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fail hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied the process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding,

considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent

part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

39.40 Procedures and jurisdiction.--

(1) All procedures, including petitions, pleadings, subpoenas, summonses, and hearings, in dependency cases shall be according to the Florida Rules of Juvenile Procedure unless otherwise provided by law.

(2) The circuit court shall have exclusive original jurisdiction of proceedings in which a child is alleged to be dependent. When the jurisdiction of any child who has been found to be dependent is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reached 18 years of age.

History.--s.20,ch.78-414.

39.401 Taking a child alleged to be dependent into custody.--

(1) A child may be taken into custody:

(a) Pursuant to an order of the circuit court issued pursuant to the provisions of this part, based upon sworn testimony, either

before or after a petition is filed.

(b) By a law enforcement officer, or an authorized agent of the department, if the officer or agent has reasonable grounds to belive that the child has been abandoned, abused, or neglected, is suffering from illness or injury, or is in immediate danger from his surroundings and that his removal is necessary to protect the child.

(c) By a law enforcement officer when the officer has reasonable grounds to believe that the child has run away from his parents, guardian, or other legal custodian.

(d) By an authorized agent of the department when he has reasonable grounds to believe the custodian of a child under protective supervision has violated in a material way a condition of the placement imposed by the court.

(e) By a lawenforcement officer, when he has reasonable grounds to believe that the child is absent from school without authorization

for the purpose of delivering the child without unreasonable delay to the school system.

(2) If the person taking the child into custody is not an intake officer, he shall:

(a) Release the child to a parent, guardian, legal custodian, responsible adult approved by the court when limited to temporary emergency situations, responsible adult relative, responsible adult approved by the department, or court-approved runaway shelter if the person taking the child into custody has reasonable grounds to believe the child has run away from a parent, guardian, or legal custodian; following such release, the person taking the child into custody shall make a full written report to the intake office of the department within 3 days; or

(b) Deliver the child to an intake officer of the department, stating the facts by reason of which the child was taken into

custody and sufficient information to establish probable cause that the child is dependent, and made a full written report to the intake office of the department within 3 days.

(3) If the child is taken into custody by, or is delivered to, an intake officer, the intake officer shall review the facts and made such further inquiry as necessary to determine whether the chidl should remain in custody or be released. Unless shelter is required as provided in s. 39.402(1), the intake officer shall:

(a) Release the child to his parent, guardian, or legal custodian, a responsible adult relative, a responsible adult approved by the department, or a court-approved runaway shelter; or

(b) Authorize placement of a caretaker/ homemaker in the home of a child alleged to be dependent until the parent or legal custodian assumes care of the child.

History.--s.20,ch.78-414.

29.402 Placement in a shelter.--

(1) Unless ordered by the court pursuant to the provisions of this chapter, a child taken into custody shall not be placed in a shelter prior to a court hearing unless such placement is required:

(a) To protect the child; or

(b) Because he has no parent, legal custodian, or responsible adult relative to provde supervision and care for him.

(2) If the intake officer determines that placement in a shelter is necessary according to the provisions of subsection (1), the intake officer shall authorize placement of the child in a shelter and shall immediately notify the parents or legal custodians that the child was taken into custody.

(3) If the child is alleged to be both dependent and delinquent, the intake officer may authorize either detention or placement in a shelter.

(4) Any child who is a runaways and who is likely to injure himself or others or who is in need of care and treatment and lacks sufficient capacity to determine what course of action is in his own best interest may be placed in a secure shelter or in a detention home for a period not to exceed 24 hours. If neither a secure shelter nor a detention home is available to receive the child, the child may be placed in a jail for a period of time not to exceed 24 hours. However, no child in a detention home or jail shall be placed in a cell with any child or adult alleged to have committed, or who has been adjudged to have committed, a crime.

(5) The circuit court, or the county court, if previously designated by the chief judge of the circuit court for such purpose, shall hold the detention hearing. When the county judge is not an attorney, the chief judge may designate a member of the bar to hold

the detention hearing. The reasons for placement in a shelter provided in subsection (1) shall govern the decision of all persons responsible for determining whether placement in a shelter is warranted prior to the court's disposition.

(6)(a) No child shall be held in a shelter longer than 24 hours, excluding Sundays or legal holidays, unless an order so directing is made by the court after a detention hearing finding that placement in a shelter is necessary based on the criteria in subsection (1), that placement in a shelter is in the best interest of the child, and that there is probable cause that the child is dependent.

(b) In the interval until the detention hearing is held pursuant to paragraph (a), the decision as to palcement in a shelter or rlease of the child from a shelter shall lie with the intake officer in accordance with subsection (2).

(7) No child shall be held in a shelter

under an order so directing for more than 14 days unless an order of adjudication for the case has been entered by the court.

(8) No child shall be held in a shelter for more than 30 days following the entry of an order of adjudication unless an order of disposition pursuant to s. 39.41 has been entered by the court.

(9) The time limitations in subsections (6) and (7) shall not include:

(a) Periods of delay resulting from a continuance granted at the request or with the consent of the child's counsel or, if the child is of sufficient capacity to express reasonable consent, at the request or with the consent of the child's attorney and the child.

(b) Periods of delay resulting from a continuance granted at the request of the state attorney, or the attorney designated by the state attorney, if the continuance is granted.

1. Because of an unavailability of evidence material to his case when the state attorney, or the attorney designated by the state attorney, has exercised due diligence to obtain such evidence and there are substantial grounds to believe that such evidence will be available within 30 days; or

2. To allow the state attorney, or the attorney designated by the state attorney, additional time to prepare his case and additional time is justified because of the exceptional circumstances of the case.

History.--s.2,ch.78-414.

39.403 Intake.--

(1) Intake shall be performed by the department. A report or complaint alleging that a chidl is dependent shall be made to the intake office operating in the county in which the child is found or in which the case arose. Any person or agency having knowledge of the facts may make a report or complaint. The complainant shall furnish

the intake office facts sufficient to establish the jurisdiction of the court and to support a finding by the court that the child is dependent.

(2) The intake officer shall make a preliminary determination as to whether the report or complaint is complete, consulting with the state attorney or assistant state attorney when necessary. In any case in which the intake officer or the state attorney finds that the report or complaint is incomplete, the intake officer or state attorney shall return the report or complaint without delay to the person or agency originating the report or complaint or having knowledge of the facts or to the appropriate law enforcement agency having investigative jurisdiction and request additional information in order to complete the report or complaint; however, the confidentiality of any report filed in

accordance with s. 827.07 shall not be violated.

(a) If the intake officer determines that the report or complaint is complete, he may, after determining that such action would be in the best interests of the child, file a petition for dependency.

(b) If the intake officer determines that the report or complaint is complete, but that in his judgment the interest of the child and the public will be best served by providing the child care or other treatment voluntarily accepted by the child and his parents or legal custodians, the intake officer may refer the child for such care or other treatment.

(c) If the intake officer refuses to file a petition for dependency, the complainant shall be advised of his right to file a petition pursuant to this part.

History.--s.20, ch.78-414.

34.404 Petition for dependency.--

(1) All proceedings seeking an adjudication that a child is dependent shall be initiated by the filing of a petition by the state attorney, an authorized agent of the department, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true.

(2) The petition shall be in writing and shall be signed by the petitioner under oath stating his good faith in filing the petition. When the petition is filed by the state attorney, it may be signed by the state attorney or by an assistant state attorney.

(3) The state attorney or the attorney designated by the state attorney shall represent the state in any proceeding in which the petition alleges dependency whenever a party denies the allegations of the petition and contests the adjudication.

(4) When a petition for dependency has been filed and the parents or custodians of the child have advised the intake office that the truth of the allegations is acknowledged and that no contest is to be made of the adjudication, the intake officer may set the case before the court for an adjudicatory hearing. Neither the state attorney nor an assistant state attorney shall be required to be present at the adjudicatory hearing. Should there be a change in the plea at this hearing, the court shall continue the hearing to permit the state attorney to prepare and present the case for the state.

(5) The form of the petition and its contents shall be determined by rules of procedure adopted by the Supreme Court.

History.--s. 20, ch. 78-414.

39.405 Process and service.--

(1) Personal appearance of any person in a hearing before the court shall obviate the

necessity of serviing process on that person.

(2) Upon the filing of a petition containing allegations of facts which, if true, would constitute the child therein named as a dependent child, and upon the request of the petitioner, the clerk or deputy clerk shall issue a summons.

(3) The summons shall require the person on whom it is served to appear for a hearing at a time and place specified. Except in cases of medical emergency, the time shall not be less than 24 hours after service of the summons. The summons may require the custodian to bring the child to court if the court determines that the child's presence is necessary. A copy of the petition shall be attached to the summons.

(4) The summons shall be directed to, and shall be served upon, the following persons:

(a) The parents; and

(b) The legal custodians, actual custodians, and guardians ad litem, if there be any other than the parents.

(5) If it appears from the petition that the child named therein is suffering from illness or injury or that he is in immediate danger from his surroundings and that his removal is necessary, the judge shall issue an order stating the reasons why the child is being taken into custody. Upon the issuance of the summons, the person serving the summons shall forthwith take the child into custody.

(6) It shall not be necessary to the validity of a proceeding covered by this part that the parents or legal custodians be present if their identity or residence is unknown after a diligent search and inquiry have been made, if they are residents of a state other than Florida, or if they evade service or ignore a summons, but in this

event the person who made the search and inquiry shall file in the case a certificate of those facts, and the court may appoint a guardian ad litem for the child. This subsection shall not apply to a proceeding permanently to commit a child to a licensed child-placing agency or to the department for adoption placement nor to a proceeding under the Uniform Child Custody Jurisdiction Act.

(7) The jurisdiction of the court shall attach to the child and the case when the summons is served upon the child, a parent, or legal or actual custodian of the child or when the child is taken into custody with or without service of summons and before or after filing of a petition for dependency, whichever first occurs, and thereafter the court may control the child and case in accordance with this chapter.

(8) Upon the application of a party, the

state attorney, or the petitioner, the clerk or deputy clerk shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents, or other tangible objects at any hearing.

(9) All process and orders issued by the court shall be served or executed as other process and orders of the circuit court and, in addition, may be served or executed by authorized agents of the department.

(10) Subpoenas may be served within the state by any person over 18 years of age who is not a party to the proceeding.

(11) No fee shall be paid for service of any process or other papers by an agent of the department. If any process, orders, or any other papers are served or executed by any sheriff, the sheriff's fees shall be paid by the county.

History.--s. 20, ch. 78-414

39.406 No answer required.--No answer to the petition or any other pleading need be filed by any child, parent, or legal custodian, but any matters which might be set forth in an answer or other pleading may be pleaded orally before the court or filed in writing as any such person may choose. Notwithstanding the filing of an answer or any pleading, the child or parent shall, prior to an adjudicatory hearing, be advised by the court of his right to counsel and shall be given an opportunity to deny the allegations in the petition for dependency or to enter a plea to allegations in the petition before the court.

History.--s. 20, ch. 78-414.

39.407 Medical, psychiatric, and psychological examination and treatment.--After a petition for dependency has been filed, the judge may order the child named in the petition to be examined by a physician. The

judge may also order such child to be evaluated by a psychiatrist, a psychologist, or the department's developmental disability diagnostic and evaluation team. If it is necessary to place a child in a residential facility for such evaluation, then the criteria and procedure established in s. 394.463(2) or chapter 393 shall be used, whichever is applicable. After a child has been adjudicated to be a dependent child, or before such adjudication with the consent of any parent or legal custodian of the child, the judge may order the child to be treated by a physician. The judge may also order such child to receive mental health or retardation services from a psychiatrist, psychologist, or other appropriate service provider. If it is necessary to place the child in a residential facility for such services, then the procedures and criteria established in s. 394.467 or chapter 393 shall be used, whichever is applicable. For

the purpose of either examination or treatment, the judge may order the child to be placed for treatment. When any child is placed in a shelter pending a hearing, the person in charge of the shelter or his designated representative may provide or cause to be provided such medical or surgical services as may be deemed necessary by a physician. A physician shall be immediately called if there are indications of physical injury or illness, or the child shall be taken to the nearest available hospital for emergency care. A child may be provided mental health or retardation services, in emergency situations, pursuant to the procedures and criteria contained in s. 394.463(1) or chapter 393, whichever is applicable. After a hearing, the court may order the parents, guardian, or custodian, if found able to do so, to reimburse the county for the expense involved in such

emergency medical or surgical treatment. Nothing in this section shall be deemed to eliminate the right of the parents or the child to consent to examination or treatment for the child, except that consent of a parent shall not be required if the physician determines there is a serious injury or illness requiring immediate treatment and the child consents to such treatment or an ex parte court order is obtained authorizing said treatment. Nothing in this section shall be construed to authorize the permanent sterilization of the child unless such sterilization is the result of or incidental to medically necessary treatment to protect or preserve the life of the child. Except as provided in this section, nothing in this section shall be deemed to alter the provisions of s. 458.21 to eliminate the right of the juvenile or his parents, guardian, or legal custodian to consent to diagnostic examination and medical or

surgical treatment or care; nor shall it preclude a court from ordering services or treatment to be provided to the juvenile by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a church or religious organization when his health requires it and when requested by the juvenile.

History.--s. 20, ch. 78-414.

39.408 Hearings for dependency cases.--

(1) ADJUDICATORY HEARING.--

(a) The adjudicatory hearing shall be held as soon as precticable after the petition for dependency is filed and in accordance with the Florida Rules of Juvenile Procedure, but reasonable delay for the purpose of investigation, discovery, or procuring counsel or witnesses shall, whenever practicable, be granted.

(b) Adjudicatory hearings shall be conducted by the judge without a jury,

applying the rules of evidence in use in civil cases and adjourning the hearings from time to time as necessary. In a hearing on a petition in which it is alleged that the child is dependent, a preponderance of evidence will be required to establish the state of dependency.

(c) All hearings, except as hereinafter provided, shall be open to the public, and no person shall be excluded therefrom except on special order of the judge, who, in his discretion, may close any hearing to the public when the public interest or the welfare of the child, in his opinion, is best served by so doing. All hearings involving unwed mothers, custody, sexual abuse, or permanent placement of children shall remain confidential and closed to the public. Hearings involving more than one child may be held simultaneously when the several children involved are related to

each other or were involved in the same case. The child and the parents or legal custodians of the child may be examined separately and apart from each other.

(2) DISPOSITION HEARING.--The court finds that the facts alleged in the petition for dependency are proven in the adjudicatory hearing. At the disposition hearing, the court shall receive and consider a predisposition study, which shall be in writing and be presented by an authorized agent of the department. The predisposition study shall cover for any dependent child all factors specified in s. 61.13(3). A copy of this report will be furnished to the person having custody of the child at the time such person is notified of the disposition hearing. If placement of the child with anyone other than the child's parent or custodian is being considered, the study shall include

the designation of a specific length of time as to when custody by the parent or custodian will be reconsidered. This study shall not be made prior to the adjudication of dependency unless the parents or custodians of the child consent thereto. Any other relevant and material evidence, including other written or oral reports, may be received by the court in its effort to determine the action to be taken with regard to the child and may be relied upon to the extent of its probative value, even though not competent in an adjudicatory hearing.

(3) Except as provided in paragraph (1)(c), nothing in this section shall prohibit the publication of proceedings in a hearing.

History.--s. 20, ch. 78-414.

39.409 Orders of adjudication.--

(1) If the court finds that the child named in a petition is not dependent, it shall enter

an order so finding and dismissing the case.

(2) If the court finds that the child named in the petition is dependent, but finds that no action other than supervision in his own home is required, it may enter an order briefly stating the facts upon which its finding is based, but withholding an order of adjudication and placing the child's home under the supervision of the department. If the court later finds that the custodians of the child have not complied with the conditions of supervision imposed, the court may, after a hearing to establish non-compliance, but without further evidence of the state of dependency, enter an order of adjudication and shall thereafter have full authority under this chapter to provide for the child as adjudicated.

(3) If the court finds that the child named in a petition is dependent, but shall elect not to proceed under subsection (2),

it shall incorporate that finding in an order of adjudication entered in the case, briefly stating the facts upon which the finding is made, and the court shall thereafter have full authority under this chapter to provide for the child as adjudicated.

(4) An order of adjudication by a court that a child is dependent shall not be deemed a conviction, nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication, nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction or disqualify or prejudice the child in any civil service application or appointment.

History.--s. 20, ch. 78-414.

39.41 Powers of disposition.--

(1) When any child is adjudicated by a court to be dependent, the court having

jurisdiction of the child shall have the power, by order, to:

(a) Place a child under the protective supervision of an authorized agent of a department, either in the child's own home or, the prospective custodian being willing, in the home of a relative of the child or in some other suitable place under such reasonable conditions as the court may direct. A child who has been placed in his own home under the protective supervision of an authorized agent of the department, in the home of a relative, or in some other place may be brought before the court by the agent of the department supervising the placement or by any other interested person on a petition alleging a need for a change in the placement. If the parents or other custodians deny the need for a change, the court shall hear all parties in person or by counsel, or both. Upon the admission of a

need for change or after such hearing, the court shall enter an order changing the placement, modifying the condition of it, or continuing it as ordered.

(b) Commit the child to a licensed child-caring agency willing to receive the child.

(c) Commit the child to the temporary legal custody of the department. Such commitment shall invest in the department all rights and responsibilities of a legal custodian. The department shall not return any child to the physical care and custody of the person from whom he was removed, except for short visitation periods, without the approval of the court. The term of said commitment shall continue until terminated by the court or until the child reaches the age of 18.

(d)1. Permanently commit the child to the department or a licensed child-placing agency willing to receive the child for subsequent

adoption:

a.(I) If the court finds that the parent has abandoned, abused, or neglected the child;

(II) If the persons served with notice under subsection (3) fail to respond to the notice as provided in paragraph (3)(d); or

(III) If the parent or parents have voluntarily executed a written surrender of the child before two witnesses and a notary public or other officer authorized to take ackowledgments; and

b. If the court finds that it is manifestly to the best interest of the child to do so.

2. The department shall prescribe a written surrender form which shall be written in layman's terms in the principal language of the surrendering party and which shall clearly and unambiguously advise the surrendering party of the consequences of the

surrender.

(e) Order the natural or adoptive parents of such child or the natural father of a child born out of wedlock who has ackowledged his paternity in writing before the court, or the guardian of such child's estate, if possessed of assets which under law may be disbursed for the care, support, and maintenance of such child, to pay the person or institution having custody of such child reasonable sums of money at such intervals as the court may consider adequate and proper for the care support, maintenance, training, and education of such child. The court, in making such order, shall consider the circumstances and ability of such parents, or the natural father of a child born out of wedlock, to pay and the value of assets of the guardianship estate of such child, and when such order affects the guardianship estate, a certified copy of such order shall

be delivered to the judge having jurisdiction of such guardianship estate. The court may from time to time after considering the financial resources of the persons financially responsible for the child's care, order them, of any of them, to pay a reasonable amount for attorney's fees and the cost of the party maintaining any proceeding under this paragraph or for the care, support, and maintenance ofsuch child, including enforcement and modification proceedings. The court may order the amount to be paid directly to the attorney, who may enforce the order in his name.

(2) An agency granted legal custody shall have the right to determine where and with whom the child shall live but an individual granted legal custody shall exercise all rights and duties personally unless otherwise ordered by the court.

(3) Before the court may permanently commit

a child who is dependent to a licensed child-placing agency or the department for subsequent adoption, in addition to the other requirements set forth in this part, the following requirements shall be met:

(a) Notice and a copy of the petition shall be personally served upon the following persons, or forwarded to their addresses by registered mail, specifically notifying them that a petition has been filed:

1. The mother of the child.

2. The father of the child, if:

a. The child was conceived or born while the father was married to the mother;

b. The child if his by adoption;

c. The child has been established by a court proceeding to be his child;

d. He has ackowledged in writing, signed in the presence of a competent witness, that he is the father of the child and has filed such ackowledgment with the Office of Vital

Statistics of the Department of Health and Rehabilitative Services; or

e. He has provided the child with support in a repetitive, customary manner.

3. The legal custodians or guardian of the child.

4. If the natural parents who would be entitled to notice are dead or unknwon, a living relative of such child, unless upon diligent search and inquiry no such relative can be found.

(b) In the event a person required to be served with notice in the manner prescribed in paragraph (a) cannot be served, notice of hearings shall be given as prescribed by the rules of civil procedure, and service of process shall be made as specified by law for civil actions.

(c) Notice as prescribed by this section may be waived in the discretion of the judge, with regard to any person to whom notice

must be given pursuant to subsection (a), if said person executes, before two witnesses and a notary public or other officer authorized to take ackowledgments, a written surrender of the child to a licensed child-placing agency or the department.

(d) If the person served with notice under this section fails to respond within the time prescribed by the rules of civil procedure, the failure to respond shall constitute consent to permanent commitment on the part of the person given notice.

(4) A licensed child-placing agency or the department to which a child is permanently committed for subsequent adoption in accordance with this chapter may place the child in a family home for prospective subsequent adoption and may thereafter become a party to any proceeding for the legal adoption of the child and appear in any court where the adoption proceeding is pending and consent

to the adoption, and that consent alone shall in all cases be sufficient. A permanent order of commitment, whether pursuant to consent or after notice served as herein prescribed, shall permanently deprive the parents and legal guardian of any right to the child. In any subsequent adoption proceedings, the parents and legal guardian shall not be entitled to knowledge at any time after the permanent order of commitment is entered of the whereabouts of the child or of the identity or location of any person having the custody of or having adopted the child, and in any habeas corpus or other proceeding involving the child brought by any parent or legal guardian of the child, no agent of the licensed child-placing agency or department shall be compelled to divulge that information, but may be compelled to produce the child before a court of competent jurisdiction if the child is still subject to

the guardianship of the licensed child-placing agency or department. The entry of the permanent order of commitment shall not entitle the licensed child-placing agency or department to guardianship of the estate or property of the child, but the licensed child-placing agency or department shall be the guardian of the person of the child, and the court shall no longer exercise jurisdiction over the child after entry of such order.

(5) In carrying out the provisions of this chapter, the court may order the natural parents or legal guardian of a child who is found to be dependent to participate in family counseling and other professional counseling activities deemed necessary for the rehabilitation of the child.

(6) The court may at any time enter an order ending its jurisdiction over any child.

39.411 Oaths, records, and confidential information. --

(1) The judge, clerks or deputy clerks, or authorized agents of the department shall each have the power to administer oaths and affirmations.

(2) The court shall make and keep records of all cases brought before it pursuant to this chapter and shall preserve the records pertaining to a dependent child until 10 years after the last entry was made, or until the child is 18 years of age, whichever date is first reached, and may then destroy them, except that records of cases where orders were entered permanently depriving a parent of the custody of a juvenile shall be preserved permanently. The court shall make official records, consisting of all petitions and orders filed in a case arising pursuant to this part and any other pleadings, certificates, proofs of publication, summonses, warrants, and other writs which may be

filed therein.

(3) The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, subject to the provisions of s.63.162, a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and

disposition the court may deem proper, and may punish by contempt proceedings any violation of those conditions.

(4) All information obtained pursuant to this part in the discharge of official cuty by any judge, employee of the court, authorized agent of the department, or law enforcement agent shall be confidential and shall not be disclosed to anyone other than the authorized personnel of the court, the dpeartment and its designees, law enforcement agents, and others entitled under this chapter to receive that information, except upon order of the court.

(5) All orders of the court entered pursuant to this chapter shall be in writing and signed by the judge, except that the clerk or deputy clerk may sign a summons or notice to appear.

(6) No court records of proceedings under this chapter shall be admissible in evidence

in any other civil or criminal proceeding, except that:

(a) Orders permanently terminating the rights of a parent and committing the child to a licensed child-placing agency or the department for adoption shall be admissible in evidence in subsequent adoption proceedings relating to the child.

(b) Records of proceedings under this part forming a part of the record on appeal shall be used in the appellate court in the manner hereinafter provided.

(c) Records necessary therefor shall be admissible in evidence in any case in which a person is being tried upon a charge of having committed perjury.

History,-s. 20, ch. 78-313; s.15, ch. 79-164.

39.412 Contempt. -- The court may punish for contempt any person interfering with the administration of or violating any provision of this part or order of the court relative

thereto.

History, -s. 20, ch. 78-414.

39.413 Appeal. --

(1) Any child, and any parent or legal custodian of any child, affected by an order of the court may appeal to the appropriate district court of appeal within the time and in the manner prescribed by the Florida Appellate Rules.

(2) The Department of Legal Affairs or an attorney designated by the Department of Legal Affairs shall represent the state and the court upon appeal and shall be notified of the appeal by the clerk when the notice of appeal is filed in the circuit court.

(3) The taking of an appeal shall not operate as a supersedeas in any case unless pursuant to an order of the court, except that a permanent order of commitment to a licensed child-placing agency or the

department for subseqent adoption shall be suspended while the appeal is pending, but the child shall continue in custody under the order until the appeal is decided.

(4) The case on appeal shall be docketed, and any papers filed in the appellate court shall be entitled, with the initials but not the name of the child and the court case number and the papers shall remain sealed in the office of the clerk of the appellate court when not in use by the appellate court and shall not be open to public inspection. The decision of the appellate court shall be likewise entitled and shall refer to the child only by initials and court case number.

(5) The original order of the appellate court, with all papers filed in the case on appeal, shall remain in the office of the clerk of the said court, sealed and not open to inspection except by order of the appellate

court from the circuit court, together with a certified copy of the order of the appellate court.

History.-s.20, ch. 78-414.

39.414 Court and witness fees. -- In all proceedings under this chapter, not court fees shall be charged agsint, and no witness fees shall be allowed to, any party to a petition or any parent or legal custodian or child named in a summons. Other witnesses shall be paid the witness fees fixed by law.

History.-s. 20, ch. 78-414.

39.402 Placement in a shelter.--

(1) Unless ordered by the court pursuant to the provisions of this chapter, a child taken into custody shall not be placed in a shelter prior to a court hearing unless such placement is required:

(a) To protect the child; or

(b) Because he has no parent, legal custodian, or responsible adult relative to provide supervision and care for him.

(2) If the intake officer determines that placement in a shelter is necessary according to the provisions of subsection (1), the intake officer shall authorize placement of the child in a shelter and shall immediately notify the partents or legal custodians that the child was taken into custody.

(3) If the child is alleged to be both dependent and delinquent, the intake officer may authorize either detention or placement in a shelter.

(4) Any child who is a runaway and who is likely to injure himself or others or who is in need of care and treatment and lacks sufficient capacity to determine what course of action is in his own best interest may be placed in a shelter as defined under §39.01(32) for a period of time not to exceed 48 hours, excluding Saturdays, Sundays, and legal holidays, without an order by the court directing placement in a shelter in excess of such time.

(5) The circuit court, or the county court, if previously designated by the chief judge of the circuit court for such purpose, shall hold the detention hearing. When the county judge is not an attorney, the chief judge may designate a member of the bar to hold the detention hearing. The reasons for placement in a shelter provided in subsection (1) shall govern the decision of all persons responsible for determining whether placement

in a shelter is warranted prior to the disposition by the court.

(6)(a) No child shall be held in a shelter longer than 48 hours, excluding Saturdays, Sundays, and legal holidays, unless an order so directing is made by the court after a detention hearing finding that placement in a shelter is necessary based on the criteria in subsection (1), that placement in a shelter is in the best interest of the child, and that there is probable cause that the child is dependent.

(b) In the interval until the detention hearing is held pursuant to paragraph (a), the decision as to placement in a shelter or release of the child from a shelter shall lie with the intake officer in accordance with subjection (2).

(7) No child shall be held in a shelter under an order so directing for more than 14 days unless an order of adjudication

for the case has been entered by the court.

(8) No child shall be held in a shelter for more than 30 days following the entry of an order of adjudication unless an order of disposition pursuant to s. 39.41 has been entered by the court.

(9) The time limitations in subsections (6) and (7) shall not include:

(a) Periods of delay resulting from a continuance granted at the request or with the consent of the child's counsel or, if the child is of sufficient capacity to express reasonable consent, at the request or with the consent of the child's attorney and the child.

(b) Periods of delay resulting from a continuance granted at the request of the state attorney, if the continuance is granted:

1. Because of an unavailability of evidence material to his case when the state

attorney, or the attorney designated by the state attorney, has exercised due deligence to obtain such evidence and there are substantial grounds to believe that such evidence will be available within 30 days; or

2. To allow the state attorney, or the attorney designated by the state attorney, additional time to prepare his case and additional time is justified because of the exceptional circumstances of the case.

History.--s.20,ch.78-414;s.13,ch.80-290.

39.407 Medical, psychiatric, and psychological examination and treatment.--After a petition for dependency has been filed, the judge may order the child named in the petition to be examined by a physician. The judge may also order such child to be evaluated by a psychiatrist or a psychologist or, if a developmental disability is suspected or alleged, by the

developmental disability diagnostic and evaluation team of the department. If it is necessary to place a child in a residential facility for such evaluation, then the criteria and procedure established in s. 394.463(2) or chapter 393 shall be used, whichever is applicable. After a child has been adjudicated to be a dependent child, or before such adjudication with the consent of any parent or legal custodian of the child, the judge may order the child to be treated by a physician. The judge may also order such child to receive mental health or retardation services from a psychiatrist, psychologist, or other appropriate service provider. If it is necessary to place the child in a residential facility for such services, then the procedures and criteria established in s. 394.467 or chapter 393 shall be used, whichever is applicable. For the purpose of either examination or treatment, the judge may order the child to be placed

for treatment. When any child is placed in a shelter pending a hearing, the shelter home parent or the appropriate agent of the department may provide or cause to be provided such medical or surgical services as may be deemed necessary by a physician. A physician shall be immediately called if there are indications of physical injury or illness, or the child shall be taken to the nearest available hospital for emergency care. A child may be provided mental health or retardation services in emergency situations, pursuant to the procedures and criteria in s. 394.463(1) or chapter 393, whichever is applicable. After a hearing, the court may order the parents, guardian, or custodian, if found able to do so, to reimburse the county for the expense involved in such emergency medical or surgical treatment. Nothing in this section shall be deemed to eliminate the right of the parents

or the child to consent to examination or treatment for the child, except that consent of a parent shall not be required if the physician determines there is a serious injury or illness requiring immediate treatment and the child consents to such treatment or an ex parte court order is obtained authorizing such treatment. Nothing in this section shall be construed to authorize the permanent sterilization of the child unless such sterilization is the result of or incidental to medically necessary treatment to protect or preserve the life of the child. Except as provided in this section, nothing in this section shall be deemed to alter the provisions of s. 458.21 to eliminate the right of the juvenile or his parents, guardian, or legal custodian to consent to diagnostic examination and medical or surgical treatment or care; nor shall a

court be precluded from ordering services or treatment to be provided to the juvenile by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a church or religious organization, when required by his health and when requested by the juvenile.

History.--s.20,ch.78-414;s.14,ch.80-290.

39.41 Powers of disposition.--

(1) When any child is adjudicated by a court to be dependent, the court having jurisdiction of the child shall have the power, by order, to:

(a) Place the child under the protective supervision of an authorized agent of the department, either in the child's own home or, the prospective custodian being willing, in the ome of a relative of the child or in some other suitable place under such reasonable conditions as the court may direct. Protective supervision shall

continue until the court terminates it or until the child reaches the age of 18, whichever date is first.

(b) Place the child in the temporary legal custody of an adult relative willing to care for the child.

(c) Commit the child to a licensed child-caring agency willing to receive the child.

(d) Commit the child to the temporary legal custody of the department. Such commitment shall invest in the department all rights and responsibilities of a legal custodian. The department shall not return any child to the physical care and custody of the person from whom the child was removed, except for short visitation periods, without the approval of the court. The term of such commitment shall continue until terminated by the court or until the child reaches the age of 18.

(e) Change the temporary legal custody or the conditions of protective supervision

at a postdisposition hearing subsequent to the initial disposition hearing, without the necessity of another adjudicatory hearing. A child who has been placed in his own home under the protective supervision of an authorized agent of the department, in the home of a relative, or in some other place may be brought before the court by the agent of the department who is supervising the placement or by any other interested person, upon the filing of a petition which alleges a need for a change in the conditions of protective supervision or the placement. If the parents or other custodians deny the need for a change, the court shall hear all parties in person or by counsel, or both. Upon the admission of a need for a change or after such hearing, the court shall enter an order changing the placement, modifying the conditions of protective supervision, or continuing the conditions of protective supervision as ordered.

(f)1. Permanently commit the child to the department or a licensed child-placing agency willing to receive the child for subsequent adoption if the court finds that it is manifestly in the best interests of the child to do so, and:

a. If the court finds that the parent has abandoned, abused, or neglected the child; or

b. If the persons served with notice under subsection (3) fail to respond to the notice as provided in paragraph (3)(d); or

c. If the parent or parents have voluntarily executed a written surrender of the child before two witnesses and a notary public or other office authorized to take acknowledgments; or

d. If the parent or parents have failed, upon expiration of a performance agreement entered into unser s. 409.168, to comply substantially with such agreement. If

the court finds that the failure to comply with the performance agreement is the result of conditions beyond the control of the parent or parents, such failure shall not be used as grounds for permanent commitment.

2. The department shall prescribe a written surrender from which shall be written in layman's terms in the principal language of the surrendering party and which shall clearly and unambiguously advise the surrendering party of the consequences of the surrender.

(g) Order the natural or adoptive parents of such child or the natural father of a child born out of wedlock who has acknowledged his paternity in writing before the court, or the guardian of such child's estate if possessed of assets which under law may be disbursed for the care, support, and maintenance of such child, to pay the person or institution having custody of such child reasonable sums

of money at such intervals as the court may consider adequate and proper for the care, support, maintenance, training, and education of such child. The court, in making such order, shall consider the circumstances and ability of such parents, or the natural father of a child born out of wedlock, to pay and the value of assets of the guardianship estate of such child; and when such order affects the guardianship estate, a certified copy of such order shall be delivered to the judge having jurisdiction of such guardianship estate. The court may from time to time, after considering the financial resources of the persons financially responsible for the child's care, order them, or any of them, to pay a reasonable amount for attorney's fees and the cost of the party maintaining any proceeding under this paragraph or for the care, support, and maintenance of such

child, including enforcement and modification proceedings. The court may order the amount to be paid directly to the attorney, who may enforce the order in his name.

(2) An agency granted legal custody shall have the right to determine where and with shom the child shall live, but an individual granted legal custody shall exercise all rights and duties personally unless otherwise ordered by the court.

(3) Before the court may permanently commit a child who is dependent to a licensed child-placing agency or the department for subsequent adoption, in addition to the other requirements set forth in this part, the following requirements shall be met:

(a) Notice and a copy of the petition shall be personally served upon the following persons, or forwarded to their addresses by registered mail, specifically notifying them that a petition has been filed:

1. The mother of the child.

2. The father of the child, if:

a. The child was conceived or born while the father was married to the mother;

b. The child is his by adoption;

c. The child has been established by a court proceeding to be his child;

d. He has acknowledge in writing, signed in the presence of a competent witness, that he is the father of the child and has filed such acknowledgment with the Office of Vital Statistics of the Department of Health and Rehabilitative Services; or

e. He has provided the child with support in a repetitive, customary manner.

3. The legal custodians or guardian of the child.

4. If the natural parents who would be entitled to notice are dead or unknown, a living relative of such child, unless upon diligent search and inquiry no such relative can be found.

(b) In the event a person required to be served with notice in the manner prescribed in paragraph (a) cannot be served, notice of hearings shall be given as prescribed by the rules of civil procedure, and service of process shall be made as specified by law for civil actions.

(c) Notice as prescribed by this section may be waived in the discretion of the judge, with regard to any person to whom notice must be given pursuant to subsection (2), if said person executes, before two witnesses and a notary public or other officer authorized to take acknowledgments, a written surrender of the chidl to a licenses child-placing agency or the department.

(d) If the person served with notice under this section fails to respond within the time prescribed by the rules of civil procedure, the failure to respond shall constitute consent to permanent commitment on the part of the person given notice.

(4) A licensed child-placing agency or the department to which a child is permanently committed for subsequent adoption in accordance with this chapter may place the child in a family home for prospective subsequent adoption and may thereafter become a party to any proceeding for the legal adoption of the child and appear in any court where the adoption proceeding is pending and consent to the adoption; and that consent alone shall in all cases be sufficient. A permanent order of commitment, whether pursuant to consent or after notice served as herein prescribed, shall permanently deprive the parents and legal guardian of any right to the child. In any subsequent adoption proceedings, the parents and legal guardian shall not be entitled to any notice thereof, nor shall they be entitled to knowledge at any time after the permanent order of commitment is entered of the whereabouts

of the child or of the identify or location of any person having the custody of or having adopted the child; and in any habeas corpus or other proceeding involving the child brought by any parent or legal guardian of the child, no agent of the licensed child-placing agency or department shall be compelled to divulge that information, but may be compelled to produce the child before a court of competent jurisdiction if the child is still subject to the guardianship of the licensed child-placing agency or department. The entry of the permanent order of commitment shall not entitle the licensed child-placing agency or department to guardianship of the estate or property of the child, but the licensed child-placing agency or department shall be the guardian of the person of the child; and the court shall no longer exercise jurisdiction over the child after entry of such order.

(5) In carrying out the provisions of this chapter, the court may order the natural parents or legal guardian of a child who is found to be dependent to participate in family counseling and other professional counseling activities deemed necessary for the rehabilitation of the child.

(6)(a)The court may at any time enter an order ending its jurisdiction over any child.

(b) With respect to a child who is the subject of a performance agreement under s. 409.168, the court shall return the child to the custody of the natural parents upon expiration of the agreement if the parents have substantially complied with the agreement. However, the court shall not terminate its jurisdiction over the child under 6 months after the return. Based on a report of the department or agency and any other relevant factors, the court shall then determine whether its jurisdiction should be

continued or terminated; if its jurisdiction is to be terminated, it shall enter an order to that effect.

History.--s. 20, ch.78-414;s.14,ch.79-164; s.2,ch.80-102;s.15,ch.80-290.

Note.--As a result of a Conference Committee amendment to C.S. for C.S. for S.B.119, subsection (2) was renumbered as subsection (3). Reference to subsection (2) will be corrected in a subsequent reviser's bill.

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No. 80-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CIRCUIT JUDGES DIXIE
HERLONG CHASTAIN, etc., et al.,

Petitioners,

-vs-

HILARY DAVIS, individually
and on behalf of all others
similarly situated,

Respondents.

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

This Supplemental Brief is filed pursuant to Rule 22.6, Rules of the United States Supreme Court, to address the decision in Lassiter v. Department of Social Services of Durham County, North Carolina, ___U.S.___, 68 L.Ed.2d 640, 101 S.Ct. ___ (June 1, 1981),[1/]

1/ This decision was subsequent to the May 7, 1981, service of the Petition for Writ of Certiorari filed herein.

in which this Court held that there is no absolute right to appointment of counsel in state court parental status termination proceedings, but that such a determination, in the first instance, should be made on a case-by-case basis by the state trial courts.

ARGUMENT

THE HOLDING BY THIS COURT IN LASSITER v. DEPARTMENT OF SOCIAL SERVICES, SUPRA, IS CONTROLLING IN THIS CASE AND THE COURT SHOULD ACCORDINGLY REMAND THIS CASE TO THE FIFTH CIRCUIT COURT OF APPEALS FOR ACTION IN ACCORD THEREWITH.

In Lassiter v. Department of Social Services, supra, this Court reviewed the due process requirements with regard to indigent litigants in cases involving termination by the state of parental rights and found that, in a given case, the parents

may be entitled to counsel, but that the right is not absolute and is properly left to the trial court to determine on a case-by-case basis:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the Eldridge factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," Gagnon v. Scarpelli, supra, 411 US at 788, 36 L Ed 2d 656, 93 S Ct 1756, 71 Ohio Ops 2d 279, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in Gagnon v. Scarpelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, e.g., Wood v. Georgia, ___US___,

67 L Ed 2d 220, 101 S Ct 1097.[1]

This opinion is in direct conflict with the en banc opinion of the Fifth Circuit Court of Appeals which is on appeal. In that opinion,[2] the en banc majority specifically held that in all dependency proceedings pursuant to Chapter 39, Florida Statutes, except temporary emergency situations involving immediate threat to life or safety of the child, due process requires that indigent

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1/ This Court, earlier in the Lassiter decision, indicated that an absolute right to appointed counsel exists only in cases of loss of physical liberty:

> In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel; and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

2/ See Davis v. Page, 640 F.2d 604 and see fn. 7 (5th Cir. 1981).

parents be offered counsel[1/] and that counsel be supplied unless a knowing and intelligent waiver is made.[2/] The Court of Appeals, in fact, clearly stated:

> . . . In our view the complexity of these proceedings always necessitates the offer of counsel to avoid the erroneous deprivation of a fundamental liberty interest. The right involved is absolute and should not be subject to the discretion of the trial judge. We thus hold that in a formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided

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1/ It must be noted that Davis v. Page is a certified class action on behalf of "all indigent parents who have been or may be Defendants in child dependency and englect proceedings in the Juvenile and Family Division of the Circuit Court of Dade County, Florida, without being advised of their right to counsel or afforded the right to Court appointed counsel and is not simply a question of the right of Respondent Davis to an attorney."(Amended Final Judgment, A 171-172)

2/ Davis v. Page, 640 F.2d 604 and see fn. 7 (5th Cir. 1981).

> unless a knowing and intelligent waiver is made.
>
> 640 F.2d at 604.

This applies not only to cases involving permanent loss of custody, but to temporary or indefinite loss of custody, which in fact was the situation of the class representative in Davis.

The en banc dissent in Davis v. Page, approved the "case by case" approach to providing counsel now mandated by the Florida Supreme Court for cases involving temporary loss of custody in Potvin v. Keller, 313 So.2d 702 (Fla. 1975). In fact, the Florida Supreme Court has already gone beyond the United States Supreme Court, as it has required that counsel be appointed for all indigent parents in all dependency proceedings pursuant to Chapter 39, Florida Statutes, which involves permanent loss of custody, which was the Lassiter situation. In the Interest of D.B. & D.S., 385 So.2d

83 (Fla. 1980).

In summary, the courts of Florida have more than adequately met the constitutional requirements for protecting the indigent parent in dependency proceedings and have in fact provided protection in excess of that required by the Supreme Court in Lassiter. The Fifth Circuit's en banc rejection of a case-by-case analysis by the trial court of the due process need for counsel, coupled with the right to appellate review, is a clear overstepping of the constitutional limits set out in Lassiter and it is respectfully submitted that this case should be remanded to the Fifth Circuit to act in accordance with the Lassiter decision, a decision which they did not have the benefit of in handing down the en banc decision.[1/]

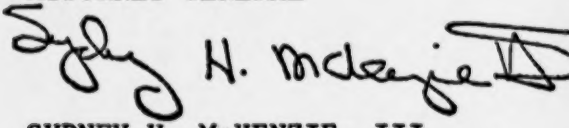
1/ Chief Judge James P. Coleman and Circuit Judge Charles Clark would, in fact, have deferred decision pending this Court's decision in Lassiter. Davis v. Page, supra, 640 F.2d 599, 605.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this matter should be remanded to the Fifth Circuit for action in accordance with the decision of this Court in Lassiter v. Department of Social Services, supra.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL BRIEF has been furnished, by U. S. Mail, to MICHAEL R. MASINTER, ESQUIRE, Counsel of Record for Respondents, 7455 S.W. 82nd Court, Miami, Florida 33143 and CHESTER G. SENF, ESQUIRE, Department of Health and Rehabiliative Services, 1317 Winewood Boulevard, Tallahassee, Florida 32301, this 13th day of August, 1981.

Sydney H. McKenzie III

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NO. 80-1888

in the Supreme Court of the United States

October Term, 1980

CIRCUIT JUDGES DIXIE HERLONG CHASTAIN, etc., et al.,

Petitioners

vs.

HILARY DAVIS, individually and on behalf of all others similarly situated,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER EITHER FEDERAL HABEAS JURISDICTION OR 42 U.S.C. §1983 PERMITS A FEDERAL COURT TO ENTERTAIN A CHALLENGE TO COMPLETED STATE DEPENDENCY PROCEEDINGS TO REMOVE A CHILD FROM THE CUSTODY OF PARENTS WHEN STATE OFFICIALS CHOOSE TO WAIVE THE DEFENSE OF RES JUDICATA AND LITIGATE THE MERITS OF THE STATE PROCEEDING.

II.

WHETHER IN LIGHT OF THE IRREPARABLE DAMAGE TO THE PARENT-CHILD RELATIONSHIP INHERENT IN PROLONGED SEPARATION AND THE DOCUMENTED RISK OF ERRONEOUS DEPRIVATION, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE STATE OF FLORIDA TO FURNISH COUNSEL TO INDIGENT PARENTS IN FORMAL ACCUSATORY DEPENDENCY ADJUDICATORY PROCEEDINGS IN WHICH IT SEEKS TO REMOVE CUSTODY OF A CHILD FROM HIS PARENTS FOR A PROLONGED OR INDEFINITE TIME.

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STATEMENT OF THE CASE

The State of Florida files approximately 2,000 petitions each year in the Dade County Circuit Court to adjudicate a child dependent. Many petitions involve allegations of abuse or neglect, and a disproportionately high number involve the children of indigent parents. The great majority of abuse and neglect petitions result in an adjudication of dependency and temporary commitment of the child to foster care for a prolonged or indefinite period under the aegis of the Florida Department of Health & Rehabilitative Services (DHRS). In its most recent evaluation, DHRS found that the mean stay in foster care for dependent children is 2 years and 10 months.[1] A Dade County Grand Jury investigation of foster care found that in 36 percent of cases examined, children had been in foster care more than 5 years.[2]

Respondent brought this action following exhaustion of state judicial remedies challenging a Dade County Circuit Court order adjudicating her child dependent and committing him to the temporary custody of DHRS. Her two count complaint predicated jurisdiction under 28 U.S.C. §1343, asserting a claim under 42 U.S.C. §1983, and under 28 U.S.C. §2241-54, and alleged that she was deprived of the custody of her son in violation of the fourteenth amendment because, although she

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[1]An Evaluation of Child Welfare Services, Office of Evaluation, Florida Department of Health & Rehabilitative Services at 30-31 (1979). The report found children who had been in foster care for as long as 17 years and 8 months. *Id.*

[2]*Id.*, at 71-73.

was indigent and had unsuccessfully sought to obtain counsel, she was not provided with counsel at the dependency adjudicatory hearing. Respondent sought the return of her son, and declaratory and injunctive relief on behalf of herself and others similarly situated requiring the appointment of counsel for indigent parents in dependency proceedings. Petitioners, Circuit Judges in the Juvenile Division of the Dade County Circuit Court, neither pleaded nor argued res judicata nor judicial immunity, and chose to litigate the constitutional questions on their merits. After an evidentiary hearing, the District Court entered an order declaring respondent's complaint for declaratory and injunctive relief against petitioners maintainable as a class action. Subsequent to class certification, the Dade County Circuit Court returned temporary custody of Carl Davis to respondent subject to the court's jurisdiction and supervision as a dependent child.

By memorandum and order of November 23, 1977, the District Court entered a summary final judgment in favor of respondent. The opinion, reported at 442 F.Supp. 258 (S.D. Fla. 1977) held that indigent parents have a constitutional right to court appointed counsel in dependency and neglect proceedings. The District Court entered an amended final judgment on January 25, 1978 formally declaring the right to counsel in dependency proceedings, ordering petitioners to appoint counsel, and awarding respondent costs and attorney's fees.

Petitioners belatedly appealed from the amended final judgment, arguing only the merits of the constitutional rule upon which it rested. A panel of the

United States Court of Appeals affirmed the amended final judgment, vacating the award of attorney's fees. *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980). Petitioners moved for rehearing en banc, and for the first time in this litigation argued that the District Court improvidently exercised its jurisdiction over the section 1983 claim, and lacked jurisdiction over the habeas claim. The Court of Appeals reheard the case en banc, and in an opinion reported at 640 F.2d 599, affirmed that part of the amended final judgment vacating the dependency adjudication, modified the declaratory relief, holding that indigent parents have a right to counsel in dependency adjudicatory proceedings in which the state seeks prolonged or indefinite custody, vacated as unnecessary the injunctive relief, and reversed the award of attorney's fees. Petitioners sought and obtained a stay of the mandate of the Court of Appeals, but neither sought nor obtained a stay of the judgment of the District Court. Since shortly after entry of the amended final judgment, petitioners have been appointing counsel in dependency adjudicatory proceedings.

The facts which gave rise to this litigation are largely undisputed. On January 30, 1976, respondent's then husband hit her 14 month old baby, Carl, breaking his arm. Respondent immediately left her husband and immediately secured medical assistance for her son, relating the circumstances of his injury to doctors and social workers in attendance. While Carl underwent treatment, an attending social worker determined that the state agency responsible for investigating suspected cases of child abuse should be notified and should seek custody prior to his release.

The state, which operates public assistance programs designed to help abandoned families, initiated a dependency proceeding under Chapter 39, Florida Statutes, seeking to remove Carl from the custody of respondent. Respondent attended an emergency hearing on February 4 without counsel held only hours following service of process in the Juvenile and Family Division of the Dade County Circuit Court. The presiding judge did not offer to appoint counsel for respondent during the emergency hearing but advised her to have counsel at the formal adjudicatory hearing, and granted custody of Carl to DHRS pending the formal hearing.

Because she was indigent, respondent was unable to retain private counsel to represent her at the March 4 adjudicatory hearing. Her efforts to obtain counsel through local legal aid offices were unsuccessful, and she appeared at the dependency adjudicatory hearing without counsel.

It was the policy and practice of Dade County Circuit Judges to conduct dependency proceedings without advising indigent parents of their right to court appointed counsel and without appointing counsel to represent indigent parents. (Complaint, Paragraph 41, R. at 7, admitted in Answers, Paragraph 5, R. at 132.) Judge Gelber conducted the dependency adjudicatory hearing. The transcript of that hearing, reproduced as an appendix to the Petition for Certiorari, reflects that, although he knew of her repeated unsuccessful attempts to secure representation, the judge neither asked respondent if she would like the assistance of counsel nor offered to appoint counsel to represent her. (A 177-179). Although under Florida law the temporary

custody which the state sought "shall continue until terminated by the court or until the child reaches the age of 18,"[3] the court never apprised respondent of its legal significance.

At the conclusion of the hearing, Judge Gelber adjudicated Carl Davis dependent, committing him to the temporary custody of DHRS pursuant to Sections 39.10(4) and 39.11(1)(c), Florida Statutes. Judge Gelber concluded the hearing by telling Hilary Davis:

> I want you to contact that lawyer that you spoke to, tell him what happened, and advise him that he can—well, tell him to get in touch with Mr. Jaski [counsel for the state], and he will fill him in as to what happened, and he can then take whatever action he deems appropriate in your best interest.

(A 199). He did not advise her of her right under Section 39.14(1), Florida Statutes, to appeal from the adjudication of dependency.

Hilary Davis retained counsel after the expiration of the 30 days within which to appeal the adjudication of dependency.[4] On May 11, 1976, she filed a Petition for Writ of Habeas Corpus in the Florida Supreme

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[3]Fla. Stat. §39.11 (1)(c).

[4]Judge Brown's dissent from the panel opinion reproduced in the Appendix at A 62-77 was predicated upon the mistaken assumption that Florida law permitted the taking of an appeal within 60 days following the entry of a final judgment. When apprised of the error, Judge Brown amended his dissent, and the amended version appears in the bound report of the decision.

Court seeking the return of her son on the ground that the failure of the Circuit Court to apprise her of her right to the assistance of court appointed counsel and to appoint counsel to represent her deprived her of due process of law and the equal protection of law in violation of the fourteenth amendment. The Florida Supreme Court denied her Petition without opinion on May 18, 1976, and this litigation followed.

ARGUMENT

I.

BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT PROPERLY EXERCISED ITS JURISDICTION UNDER 28. U.S.C. §1343 TO HEAR RESPONDENT'S CLAIM UNDER 42 U.S.C. §1983, IT IS UNNECESSARY TO REVIEW THE ALTERNATIVE HOLDING OF THE COURT OF APPEALS THAT JURISDICTION LIES UNDER 28 U.S.C. §2241-54.

While petitioners correctly note the conflict among the circuits over the scope of federal habeas jurisdiction in state initiated child custody matters, they fail to recognize that the holding below respecting habeas jurisdiction is but one of two alternative grounds upon which the Court of Appeals upheld the exercise of federal jurisdiction. Respondent predicated her claims for relief upon 42 U.S.C. §1983 and upon federal habeas jurisdiction under 28 U.S.C. §2241-54. In resolving objections to the exercise of jurisdiction which petitioners raised for the first time in their petition for rehearing en banc, the Court of Appeals held that the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) did not require dismissal of the section 1983 claim,[5] and that respondent properly invoked federal habeas jurisdiction.[6]

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[5] *Davis v. Page*, 640 F.2d 599, 601 (5th Cir. 1981); A 90-92.

[6] *Id.* at 602; A 92-95.

Petitioners appear to have abandoned their argument, first advanced in their rehearing petition in the Court of Appeals, that the *Younger* doctrine barred consideration of respondent's section 1983 claim. The first of petitioner's Questions Presented for Review and the accompanying argument only seek review of the holding below that respondent's claims come within the scope of habeas jurisdiction. Since petitioners do not contest the holding below that the district court properly reached the merits of the section 1983 claim, no purpose would be served in rendering what in the context of this litigation would be essentially an advisory opinion delineating the scope of federal habeas jurisdiction in state initiated child custody proceedings.

While the Court has in exceptional cases granted certiorari to review a question not presented in the petition for certiorari, there is no reason sufficient to exercise that power in this case to review the holding of the Court of Appeals that the *Younger* doctrine is inapposite. When respondent began this action, the dependency adjudicatory proceeding had concluded. She had exhausted all available state remedies to challenge the dependency adjudication when the Supreme Court of Florida denied her petition for habeas corpus. Neither her complaint nor her motion for summary judgment sought to intrude into any pending dependency adjudicatory proceeding. Rather she sought relief from the past adjudication based upon her right to counsel. The amended final judgment in its original form and as modified does not enjoin any pending dependency proceeding. Against this background, the Court of Appeals held that since the state adjudicatory proceeding had concluded and respondent had exhausted state judicial

remedies, the *Younger* doctrine did not require dismissal of her section 1983 claim. That decision is in accord with the prior decisions of this Court.

In an unbroken lines of cases beginning with *Ex Parte Young*, 209 U.S. 123 (1908), the Court has recognized the power of the federal courts to protect against the deprivation of federal constitutional rights by state officers. *Younger v. Harris*, 401 U.S. 37 (1971) established a now well-recognized exception to the rule of *Ex Parte Young*: in the absence of extraordinary circumstances, considerations of equity, comity and federalism prohibit a federal court from interfering with a pending criminal prosecution. The court has since expanded the *Younger* doctrine to prohibit interference with certain pending civil proceedings, holding most recently in *Moore v. Sims*, 442 U.S. 415 (1979) that absent extraordinary circumstances, considerations of comity and federalism prohibit a federal court from enjoining the prosecution of a pending proceeding to adjudicate a child dependent.

Throughout its development, the touchstone of the *Younger* doctrine has been the prohibition against equitable relief directed at *pending* state judicial proceedings. The Court has never intended *Younger* as a general bar to federal jurisdiction in suits seeking declaratory and injunctive relief against state officers. In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Court held that prospective relief against future threatened judicial proceedings is generally available as long as the proceeding in question is not yet pending. While expanding *Younger* to include certain pending civil proceedings, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) further sharpened *Younger's* focus on pending

proceedings. *Huffman* held that the *Younger* considerations of comity and federalism require that a state defendant who would challenge as a federal plaintiff the judgment of a state trial court must first exhaust available state judicial remedies.[7] 420 U.S. at 607-611. Thus *Huffman* held that a federal plaintiff who has exhausted state remedies may proceed unencumbered by the *Younger* doctrine.[8]

Respondent vigorously pursued her available state remedies before resorting to federal litigation. Only when she had exhausted available state remedies did she initiate federal proceedings. Unlike the federal plaintiff in *Moore v. Sims, supra*, respondent did not launch a multifaceted challenge seeking to enjoin the state from conducting a pending proceeding to adjudicate a child dependent; her claim was narrowly focused and does not challenge Florida's authority to protect its children under Chapter 39. The decision below that her section 1983 claim was properly before district court is therefore in accord with prior decisions of this Court.

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[7]Because the federal plaintiff in *Huffman* deliberately bypassed state judicial remedies, federal relief was unavailable. Similarly, in *Juidice v. Vail*, 430 U.S. 327 (1977), federal relief was unavailable to state defendants who, although represented by counsel, deliberately bypassed available state remedies in favor of federal injunctive relief against a pending state contempt proceeding. 430 U.S. at 330-33.

[8]In so ruling, *Huffman* announced a rule for section 1983 plaintiffs challenging state adjudications analogous to the exhaustion requirement in federal habeas corpus proceedings embodied in 28 U.S.C. §2254. In both instances, the exhaustion requirement avoids unnecessary friction between the federal and state judicial systems by assuring state courts an opportunity to correct constitutional errors.

In holding that the *Younger* doctrine was inapplicable, the Court of Appeals decided a question unlikely to recur. As the Court noted in *Huffman*, a federal plaintiff challenging a state judgment or order ordinarily will encounter the defenses of res judicata and collateral estoppel. In this case, petitioners neither pleaded nor argued those defenses below, choosing instead to litigate the merits of the asserted right to counsel. When they lost in the district court, they only belatedly appealed, and in their argument before the panel, petitioners sought to litigate only the merits. Petitioners raised *Younger* only after choosing to litigate on the merits and losing twice. Following rejection of their argument in the Court of Appeals, they have not raised *Younger* here. The Court should not now raise it sua sponte, and should therefore decline to review the scope of federal habeas jurisdiction.

II.

THE COURT OF APPEALS CORRECTLY ANTICIPATED THE REASONING OF *LASSITER* WHEN IT HELD THAT THE FOURTEENTH AMENDMENT REQUIRES THE PROVISION OF COUNSEL TO INDIGENT PARENTS IN FLORIDA DEPENDENCY PROCEEDINGS IN WHICH THE STATE SEEKS INDEFINITE OR PROLONGED TEMPORARY CUSTODY OF A CHILD.

While the Court of Appeals decided this case without benefit of this Court's recent decision in *Lassiter v. Department of Social Services of Durham County, North*

Carolina, No. 79-6423 (U.S. June 1, 1981), it is apparent from the limited scope of the en banc decision and the statutory framework of Florida dependency proceedings that the decision anticipates and correctly applies the *Lassiter* criteria. *Lassiter* requires a weighing of the parents' interest, the risk of erroneous deprivation, and the state's interest, criteria first announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In fashioning a narrowly drawn right to counsel, the Court of Appeals applied *Mathews*, concluding that in Florida dependency proceedings in which the state seeks prolonged or indefinite custody, the presumption against appointed counsel is overcome. Because the parent's interest in the Florida proceeding is significantly greater that the interest at stake in *Lassiter*, because the risk of erroneous deprivation of that interest is far greater, and because Florida has by statute foresworn any interest in informality, *Lassiter* requires precisely the conclusion reached by the Court of Appeals. Thus, it would serve no purpose to remand these proceedings to the Court of Appeals for reconsideration in light of *Lassiter*.

A. The Decision Below Fashions a Limited Right to Counsel in a Narrow Category of Florida Dependency Proceedings

Contrary to petitioners' assertions, the Court of Appeals substantially narrowed the absolute right to counsel fashioned by the District Court, limiting the right to those cases in which the state seeks to deprive a parent of prolonged or indefinite custody.[9] The decision below is thus inapplicable to those dependency

[9] 640 F.2d at 604; A 103.

proceedings in which the state seeks only protective supervision or temporary placement in the home of a relative.[10]

Florida law authorizes an adjudication of dependency upon a showing that parents have abandoned, abused, or neglected a child, upon voluntary surrender for adoption, and upon a showing that the child is habitually truant, persistently disobedient, or has persistently run away.[11] A dependency adjudication founded upon allegations of habitual truancy, persist disobediance, or persistently running away will in the first instance result in judicial supervision in the home of parents or relatives.[12] When the state seeks to take a child from his parent for a prolonged or indefinite period in the absence of prior adjudications, it will allege that the child is abandoned, abused, or neglected.[13] Thus, the decision below is effectively limited to those cases in which the state seeks prolonged or indefinite custody based upon abandonment, abuse, or neglect.

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[10]Fla. Stat. §39.41(1).

[11]Fla. Stat. §39.01(9).

[12]*See, e.g., D.H. v. Polen*, 396 So.2d 1189 (Fla. Dist. Ct. App. 1981); *cf. In re A.Z.*, 383 So.2d 934 (Fla. Dist. Ct. App. 1980).

[13]When the adjudication is based upon voluntary surrender for adoption, the parent must execute a waiver of the right to counsel. Fla. R. Juv. P.

B. The Parent's Interest in Actual Care and Custody at Issue in Adjudicatory Proceedings is Greater Than the Judicially Curtailed Interest of a Parent Previously Deprived of Care and Custody at Issue in Termination Proceedings.

As *Lassiter* recognizes, the parent's interest in care, custody, and companionship of her child is profound. The core of that liberty interest is actual care and custody, an interest which is not at stake in termination proceedings.[14] Medical evidence in the record below and generally accepted medical literature make clear the great damage which occurs to the parent-child relationship and to the child's development when the state removes a child for a prolonged or indefinite period.[15] Subsequent restoration of custody cannot repair

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[14]Proceedings to terminate parental rights presuppose a previous adjudication of dependency and commitment to foster care. As *Lassiter* notes, termination proceedings focus upon parental conduct subsequent to the loss of custody. Slip op. at 10 n.4. In North Carolina, there is an absolute right to counsel in adjudicatory proceedings. N.C.G.S. 7-A-587.

[15]442 F.Supp. at 261 n.7. The devastating impact of prolonged separation upon the parent-child relationship and upon the child is well documented. Bowelby, Child Care and the Growth of Love 13-20 (2d ed. 1965); Buxbaum, *The Problem of Separation and the Feeling of Identity*, Child Welfare 8 (1955); Geiser, The Illusion of Caring: Children in Foster Care 35-129 (1972); Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* 9-38 (1973). An evaluation by DHRS of child welfare services indicates that some 19% of children in foster care in Florida are emotionally disturbed. *An Evaluation of Florida's Child Welfare Services*, at 33.

that damage,[16] and termination of parental rights cannot exacerbate it.[17]

Termination of parental rights is ultimately the legal recognition that the parent-child relationship is dead. The actual death of that relationship occurs prior to the initiation of termination proceedings, and is the all but inevitable result of prolonged separation. Thus, in every meaningful sense, far greater interests are at stake when the state first seeks prolonged or indefinite custody in an adjudicatory proceeding that when it seeks judicial recognition of the consequences of that separation in a termination proceeding.

The interest of the parent at stake when the state seeks prolonged or indefinite custody in an adjudicatory hearing is reinforced by the peculiar structure of Florida proceedings. Once an adjudication of dependency enters, the nature of further proceedings shifts dramatically. A child committed to temporary state custody remains in state custody until a court orders otherwise or the child reaches the age of 18.[18] All subsequent proceedings are disposition hearings in which a parent must prove that, because of developments subsequent to the

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[16]Goldstein, Freud, & Solnit, *supra* at 38.

[17]As the duration of separation increases, the case for termination becomes compelling; the child's interest dictates permanent placement in a new home to fill the void created by prolonged separation. See generally Goldstein, Freud, & Solnit, *supra*; Goldstein, Freud Before the Best Interests of the Child (1980).

[18]Fla Stat. 39.41(1)(c).

adjudication, restoration of custody is in the best interest of the child. Florida courts have held:

> Evidence that may be totally inadequate to deprive a parent of the custody of his child in the first instance may be altogether adequate to support the court's refusal to restore custody to the parents once the child has become a ward of the state.[19]

Thus, the liberty interest of a parent is greatest when the state initiates a dependency proceeding seeking prolonged or indefinite custody of a child.

C. Under Florida Law, the State Has No Interest in Informality.

Florida has no counterveiling interest in informality at dependency adjudicatory hearings, for it has invested them with all the trappings of formal accusatory proceedings. By statute, the state is always represented by counsel under formal rules of evidence.[20] Under Florida law, social workers cannot prosecute contested

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[19]*Pendarvis v. State*, 104 So.2d 651, 652 (Fla. Dist. Ct. App. 1958). The Pendarvis parents repeatedly failed in efforts to recover custody of their child, each time foundering upon the same critical distinction between adjudicatory hearings and disposition hearings. *Pendarvis v. State*, 104 So.2d 651 (Fla. Dist. Ct. App. 1958); *Pendarvis v. State*, 115 So.2d 81 (Fla. Dist. Ct. App. 1959); *Pendarvis v. State*, (Fla. Dist. Ct. App. 1960) (unreported decision); *In re Pendarvis*, 133 So.2d 424 (Fla. Dist. Ct. App., 1961).

[20]Fla. Stat. §§39.404(3), 39.408(1)(b).

proceedings.[21] Thus, in the *Lassiter* calculus, the state interest in informality is always at its weakest in Florida.

D. There is a Great Risk of Erroneous Deprivation in Florida Dependency Proceedings.

The record below established by uncontroverted evidence the risk of erroneous deprivation. No party has yet suggested that respondent's child should have been removed from her custody.[22] An attorney who has prosecuted more than 100 dependency adjudicatory proceedings on behalf of DHRS stated in his affidavit that unrepresented parents rarely cross-examine witnesses, submit documentary evidence, call witnesses, or present a defense. (R. at 141). Because unrepresented parents do not understand the proceedings, many "sit mute and passive and do nothing in their own defense, thereby giving, wrongfully, the impression that they just don't care." (R. at 142).

The transcript of the adjudicatory hearing, reproduced as an appendix to the Petition for Certiorari, demonstrates what happens to a lay parent unfamiliar with the judicial process. Without counsel, respondent was reduced to "little more than a spectator."[23] The protection theoretically afforded her by ordinary rules

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[21]Fla. Stat. §39.404(3).

[22]Significantly, DHRS, the agency which initiated the proceedings in state court, did not appeal from the decision of the District Court.

[23]442 F. Supp. at 260, A 143; 640 F.2d at 603, A 100.

of evidence quickly dissolved in a torrent of inadmissable hearsay and opinion testimony. Respondent never understood that temporary custody could last until her child became an adult, and lacking legal training, she was unable to participate effectively in the proceedings. As the Court of Appeals noted, her case was not unique.[24]

It is evident that counsel can contribute substantially to prevention of an erroneous adjudication of dependency. Beyond excluding the inadmissable evidence, counsel in this case could have argued persuasively that the evidence was inadequate to sustain an adjudication of dependency, pointing out that respondent's former husband injured her son, that she was separated from him, and that readily available public assistance programs would have provided a regular and secure income with which to house and care for her son. In light of testimony that respondent's former husband represented a continuing threat to the safety of respondent and her son, counsel could have argued that rather than removing the child from his mother, the state should either prosecute her former husband or initiate civil commitment proceedings. Because respondent was not represented by counsel, none of these arguments were made, and she lost custody of her child for one year.

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[24]*See, eg., In re A.Z.*, 383 So.2d 934 (Fla. Dist. Ct. App. 1979); *In re R.W. H.*, 375 So.2d 321 (Fla. Dist. Ct. App. 1979). In both cases, parents were fortunate enough to obtain counsel after the hearings in question, and secured reversals of the dependency adjudications. Had they not obtained counsel, there would have been no appeal, their cases never would have come to light, and they would have found themselves in the same position as the great majority of unrepresented parents—childless.

Under the three pronged analysis of *Mathews*, reaffirmed in *Lassiter*, the Court of Appeals reasoned that an indigent parent has a right to counsel in dependency adjudicatory proceedings in which the state seeks prolonged or indefinite custody. The case by case right respondents advocate, a right which has existed in Florida since 1973, has not worked,[25] and cannot work. While a trial judge in a termination proceeding has a substantial record based upon earlier dependency proceedings to assist him in determining whether to appoint counsel, the factors by which courts might make case by case judgments in adjudicatory proceedings are unknowable in advance of the proceedings. The right to be heard must encompass the right to counsel in adjudicatory proceedings in which the state seeks prolonged or indefinite custody.

[25]To date, not a single decision of a Florida appellate court has reversed an adjudication of dependency resulting in a temporary commitment to DHRS for failure to appoint counsel.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 80-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CIRCUIT JUDGES DIXIE
HERLONG CHASTAIN, etc., et al.,

Petitioners,

-vs-

HILARY DAVIS, individually
and on behalf of all others
similarly situated,

Respondents.

REPLY BRIEF

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-vs-

HILARY DAVIS, individually
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Respondents.

REPLY BRIEF

This Reply Brief is submitted pursuant to Rule 22.5, Rules of the United States Supreme Court, to address arguments first raised in the Brief of Respondents in opposition to the Petition for Writ of Certiorari submitted by Petitioners in this matter.

ARGUMENT

I. THE EN BANC DECISION IN DAVIS v. PAGE IS DIRECTLY CONTRARY TO THE LATER OPINION OF THIS COURT IN LASSITER v. DIVISION OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA, ___U.S.___, 68 L.Ed.2d 640, 101 S.Ct. ___(June 1, 1981) AND SHOULD BE ACCORDINGLY REMANDED TO THE FIFTH CIRCUIT IN LIGHT OF THE LASSITER OPINION.

In their Brief in Opposition to the Petition for Certiorari filed herein, Respondents recognize the significance of this Court's decision in Lassiter v. Division of Social Services, supra, which decision was issued after the filing of the Petition for Certiorari, but, it is submitted, are totally in error in their analysis of the impact which it has on the en banc decision which is the subject of the Petition.

The Fifth Circuit, en banc, held, with regard to the right to counsel for indigent parents in Florida dependency proceedings:

> . . . In our view of the complexity of these proceedings always necessitates the offer of counsel to avoid the erroneous deprivation of a fundamental liberty interest. The right involved is absolute and should not be subject to the discretion of trial judge. We thus hold that in a formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made.[1/]

This appears directly contrary to the determination of this Court that trial courts are the proper courts to make the

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1/ Thus, initially every custody proceeding, except "emergency" proceedings are included in the decision of the Fifth Circuit. Indeed, unless the trial court can be certain that custody by the state will not be prolonged or indefinite, the mandate applies.

initial determination of the need for counsel on a case-by-case basis:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the Eldridge factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," Gagnon v. Scarpelli, supra, 411 US at 788, 36 L Ed 2d 656, 93 S Ct 1756, 71 Ohio Ops 2d 279, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in Gagnon v. Scarpelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, e.g., Wood v. Georgia, ___ US ___, 67 L Ed 2d 220, 101 S Ct 1097.

Respondents remarkably argue that the en banc Davis decision anticipates

and conforms to Lassiter,[1] in spite of the fact that Lassiter defers the decision on the need for counsel even in permanent custody proceedings, initially to the trial court on a case-by-case basis, while Davis specifically indicates that such a determination "should not be subject to the discretion of the trial judge." The conflict of the opinions is obvious and irreconcilable.

Florida already provides an absolute right to counsel in permanent loss of custody proceedings, In the Interest of D.B. & D.S., 385 So.2d 82 (Fla. 1980), so only something less severe than the situation in Lassiter exists in Florida and, as the Court has recognized, the trial courts can

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1/ Petitioner equally remarkably asserts that the parent's interest in the Florida proceeding is significantly greater than the interest at stake in Lassiter, in spite of the fact that Lassiter involved permanent loss of custody, while, at the most, Davis involved temporary, though possibly indefinite or prolonged loss of custody.

best address the need to counsel in matters before them and where in error, the appellate courts can correct the error.

Respondent finally addresses the various criteria for determining the need to counsel. This, however, begs the issue of whether these may be properly examined by the trial court on a case-by-case basis, per Lassiter, or are made irrelevant by an absolute determination that a right to counsel exists in all by the most temporary emergency situation, per Davis.

This Court having spoken on the issue, and its guidance being now available to the Fifth Circuit, it is respectfully submitted that this case should be remanded to the Fifth Circuit to act in accordance with the Lassiter decision.

II. THE DOCTRINE OF ABSTENTION IS AN INTEGRAL PART OF THE ARGUMENT MADE BY PETITIONER THAT

THE COURT SHOULD NOT TAKE JURISDICTION OF THIS MATTER PURSUANT TO THE WRIT OF HABEAS CORPUS AND IS EXPRESSLY SET FORTH IN THE PETITION FOR WRIT OF CERTIORARI.

Respondents assert that the abstention argument, founded on concepts of federalism, has been abandoned by Petitioners. On the contrary, Petitioners assert in their Petition, as a part of the argument that Habeas Corpus does not jurisdictionally lie as a remedy:[1/]

> . . . The awesome power of the writ to avoid res judicata and its implications for federalism, demand that its use be confined to its proper role; the preservation of individual liberty and the relief from unlawful custody.

1/ While this issue is clearly part and parcel of Petitioner's argument, the issue of abstention may, of course, be raised by a court sua sponte, See Bellotti v. Baird, 428 U.S. 132 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976), n. 10, pgs. 853-54; Naylor v. Case & McGrath, Inc., 585 F.2d 557, 567 (2d Cir. 1978); BT Ins. Managers, Inc. v. Lewis, 559 F.2d 950 (5th Cir. 1977).

This is highlighted by the comments of Judge Brown in his dissent in this case:

> Once again this Court in the high name of the Constitution becomes involved by the majority in the most direct way in domestic problems wisely left to the states. Not only that, it is done by an order declaring unconstitutional prior decisions of the state's highest tribunal through the medium of an attack directed against innocent local state trial circuit judges, all of whom--including all other judges high and low in the whole state of Florida--are not categorically directed, without discretion or consideration of real needs, to conform to our edict. I think all of the principles of Federalism and the demands of comity are defeated by this action and I therefore dissent from this intrusion
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> Davis v. Page, 618 F.2d 374, 386 (5th Cir. 1980) (dissenting opinion)[1/]

It is precisely the extension of the abstention doctrine emerging from the court's opinion in Younger v. Harris, 401

1/ Petition for Writ of Certiorari to the United States Court of Appeals Fifth Circuit, pp. 10-11, Chastain v. Davis, Case No. 80-1888, Supreme Court of the United States.

U. S. 37, 91 S.Ct. 746, 77 L.Ed.2d 669 (1971), to matters involving child custody, Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979), which is the substantive basis for that discussion.

The doctrine of abstention finds its roots in equity. The United States Supreme Court in Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971, observed that the issues before it involved "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." Id. at 312 U.S. 496. In the case now before this court, several alternatives, already discussed, supra, were available to Mrs. Davis, both in the state courts and in the United States Supreme Court. Further, that the area of domestic relations is one generally reserved to the states is well-established in this country. Sosna v. State of Iowa, 419 U.S. 393, 404, 95 S.Ct. 553,

559, 42 L.Ed.2d 532, 543 (1975); DeSylva v. Ballentine, 351 U.S. 570, 580, 76 S.Ct. 974, 979, 100 L.Ed. 1415, 1426 (1956). The holding of the Pullman court created the doctrine that a federal court should not hear matters relating to the constitutionality of state statutes prior to an opportunity being afforded a state court to interpret the state statute attacked.

In Younger v. Harris, supra, the Supreme Court expanded the doctrine of abstention to prohibit federal court interference in state criminal proceedings by way of injunction. The doctrine was also expanded to include interference by way of declaratory relief. Samuel v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). The court in Younger noted that the original notions of equity upon which abstention were founded were "reinforced by an even more vital consideration, the notion of comity," ". . .

that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id. at 401 U.S. 44. The intermeshed doctrines of comity and abstention form the basis for the concept known as federalism. Id. To permit habeas relief in this context would be to avoid the very concerns which are the foundation of abstention.

The abstention doctrine, even as expanded in Younger, concerned itself with federal intervention in pending state proceedings. While it might be asserted that the denial of Mrs. Davis' petition for habeas by the Florida Supreme Court concluded all proceedings, a closer review of the facts of this case demonstrate that the contrary is true. While no particular petition was before the circuit court at the time Mrs. Davis filed her federal

action, the jurisdiction of the circuit court had been invoked and was continuing. That Mrs. Davis' counsel withheld the filing of her petition in the state circuit court until after he had filed her petition in the federal court should not result in an avoidance of the abstention doctrine.[1/]

From the time of the 1971 decision in Younger, supra, the Supreme Court has expressed a strong concern for avoidance

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1/ Further, with regard to the question of the existence of an ongoing state proceeding, Petitioner would point out two facts. First of all, Respondent Davis was involved in a proceeding involving the continuing jurisdiction of the state court pursuant to Chapter 39, and secondly, the action was a class action, including all indigents in the Dade County Court who "have been or may be" defendants in like proceedings. Clearly, this resulted in direct involvement in ongoing court proceedings of class members, who were every bit as much plaintiffs as Davis from the time of certification. In fact, the case of In the Interest of D.B. & D.S., supra, where the State Supreme Court rejected the rationale of Davis v. Page was just such a case, originating in the 11th Judicial Circuit contemporaneously with Davis v. Page.

of interference by the federal judiciary with state court proceedings. This policy of self-restraint extends to both civil and criminal proceedings, and should be applied here. In this case the Respondent had ample opportunity to present her federal constitutional claims in state proceedings; there is no suggestion of bad faith conduct or harassment of Respondent by the state judiciary; nor was the procedure challenged wholly and flagrantly violative of express constitutional prohibitions. In fact, the only federal appellate expression, Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1975), was followed by the State of Florida.

The considerations of comity and judicial restraint are bolstered by the recognition of the federal courts that domestic relations is an area of law in which federal courts have traditionally deferred to state courts. Combining this with the federal challenge to the competence of the state

judiciary to determine when counsel is required and with the actual and direct conflict created in this case by state court judges being subject to directives from two putative masters, the policy of restraint is all the more urgently before this Court.[1/] Justice Rhenquist quite clearly enunciated this concern in Huffman v. Pursue,Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975):

> The seriousness of federal judicial interference with state civil functions has long been

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1/ Indeed the concern of the Florida Supreme Court is made clear by the following discussion from In the Interest of D.B. & D.S., supra:

> Abstention Doctrine
>
> We find it necessary to address the federal abstention doctrine because our views expressed in this opinion do not conform to the decision of the United States District Court in Davis v. Page. The right to counsel in juvenile dependency proceeding has not been addressed by the United States Supreme Court. Further, only one federal appellate court, the Ninth Circuit in Cleaver v. Wilcox, has written on the issue, and we have adhered to their view.
>
> The United States Supreme Court has expressly developed a policy of self-restraint

> recognized by this court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. . . .

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directing the federal judiciary to avoid interference with state court proceedings and accept jurisdiction only when (a) the claimants have no opportunity to present their federal constitutional claims in state proceedings, or (b) there is bad faith conduct by the state, or (c) the challenged state statute is wholly and flagrantly violative of express constitutional prohibitions, in whatever manner and against whomever an effort might be made to apply it. Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The instant facts do not warrant federal intervention, particularly in light of the recent decision in Moore v. Sims. In Sims the United States Supreme Court reversed a federal intervention declaring unconstitutional the statutory deheme for child abuse proceedings in Texas, including the participants' right to counsel. The Court said: "Certainly, abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." 442 U.S. at 425-26, 99 S.Ct. at 2378.

The application of the abstension doctrine does not preclude judicial

> Although Mr. Justice Holmes was confronted with a bill seeking an injunction against state executive officers, rather than against state judicial proceedings we think that the relevant considerations of federalism are of no less weight

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consideration of an alleged constituional right; rather, it directs that a proceeding affecting state statutes or a state judicial procedure be resolved first in the state courts, absent bad faith by the state or the lack of a state forum or procedure with which to consider the particular contention. In both the instant case and Davis, there was a direct avenue in the state juvenile dependency proceeding to raise the claim of a constitutional right to counsel. Appellees could have appealed an adverse finding from either a nonfinal order, see Florida Rule of Appellate Procedure 9.100, or a final judgment direct to the Supreme Court of Florida. Art. V, §3(b)(1), Fla.Const.

Florida courts have historically sought cooperation rather than confrontation with the federal judiciary. This is illustrated by the fact that we were the first state to establish a certification process by which a federal appellate court could certify a question of state law to the Supreme Court of Florida. §25.031, Fla.Stat. (1979); Fla.R.App.P. 9.510. In this instance, however, we decline to defer to the decision of the United States District Court in Davis v. Page.

385 So.2d 82 at 93-94.

> in the latter setting. If anything, they counsel more heavily toward federal restraint, since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies, Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles." . . .

Finally, the use of Respondent of federal habeas as a vehicle to come before the federal courts is severely challenged by the First Circuit in Sylvander v. New England Home for Little Wanderers, 584 F.2d 1102 (1st Cir. 1978). As pointed out there, the welfare of the child is primarily the concern of the state and one in which the primary expertise lies with judges of the state family courts. Furthermore, it is in no way a confinement or custodial detention situation. The decision recognizes the substantial intrusion into federal-state relations resulting from

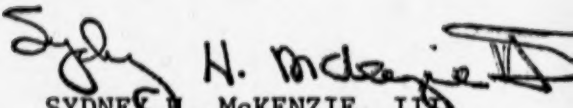
federal habeas actions. The considerations in this particular case magnify that situation, confirm the concerns of that opinion, and add substantially to the rationale for this court to follow that decision.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to grant the Petition for Certiorari.

Respectfully submitted

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF has been furnished, by U. S. Mail, to MICHAEL R. MASINTER, ESQUIRE, Counsel of Record for Respondents, 7455 S.W. 82nd Court, Miami, Florida 33143 and CHESTER G. SENF, ESQUIRE, Department of Health and Rehabilitative Services, 1317 Winewood Boulevard, Tallahassee, Florida 32301, this 13th day of August, 1981.

Sydney H. McKenzie III

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